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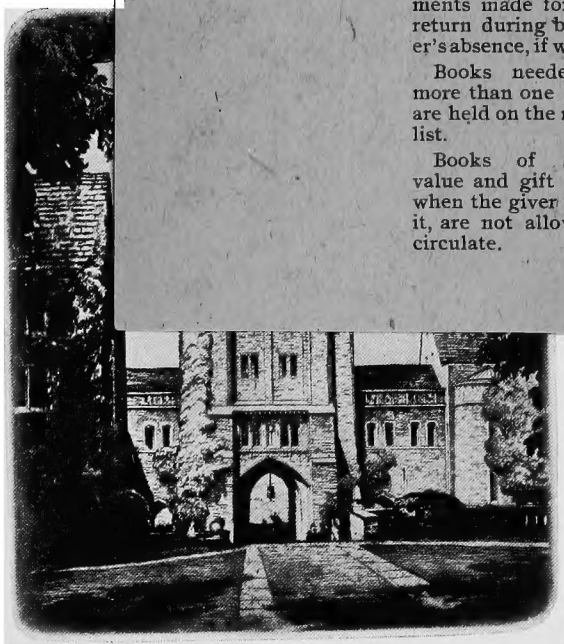
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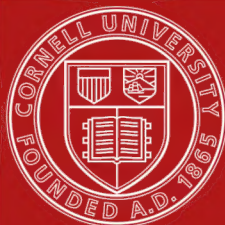
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TREASURY DEPARTMENT,

Document No. 2404.

*Comptroller of the Currency.*



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# DIGEST OF NATIONAL BANK DECISIONS.

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## NATIONAL BANK AS INDORSER, GUARANTOR, OR SURETY ON COMMERCIAL PAPER SOLELY FOR ACCOMMODATION.

### *Accommodation indorser.*

1. A national bank can not become an accommodation indorser.  
(U. S. C. C., 1893) *Nat. Bank of Commerce v. Atkinson*, 55 Fed. Rep., 465;  
(U. S. C. C.) *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, U. S., 647;  
(Mich., 1890) *Knickerbocker v. Wilcox*, 83 Mich., 200;  
(Nebr., 1894) *Thomas v. City National Bank*, 40 Nebr., 501; 46 Nebr. (1896), 861;  
(N. Y., 1880) *National Bank of Gloversville v. Wells*, 79 N. Y., 499, reversing *National Bank of Gloversville v. Wells*, 15 Hun, 51 (N. Y., 1878).

### *Accommodation guarantor.*

- 2 (U. S. Sup. Ct., 1879). The national bank act gives every bank the powers of "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." To hand over with an indorsement or guaranty is one of the commonest modes of transferring the securities named. *Held*, that the bank was not prohibited by law from guaranteeing the payment of the note. (*People's Bank v. National Bank*, 101 U. S., 181.)
- 3 (U. S. C. C. A., 1899). An agreement by a national bank to guarantee the payment of the debt of a third party, solely for his benefit, is ultra vires. A corporation is estopped to contend that its contract was ultra vires only when it seeks to retain unjustly the fruits of the contract which has been performed by the other party. (*Bowen v. Needles Nat. Bank*, 94 Fed. Rep., 925.)
- 4 (U. S. C. C.). A national bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposits. (*Seligman v. Charlottesville National Bank*, 3 Hughes, U. S., 647.)
- 5 (U. S. C. C., 1893). Revised Statutes, section 5136, empowers a national bank to "exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, \* \* \* and other evidences of debt ;

## ACCOMMODATION PAPER—Continued.

## NATIONAL BANK AS INDORSER, GUARANTOR, ETC.—CONTINUED.

- \* \* \* by loaning money on personal security," etc. *Held*, that the cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft. (*Flannagan et al. v. California Nat. Bank et al.*, 56 Fed. Rep., 959.)
- 6 (U. S. C. C. A., 1899). It is ultra vires on the part of a national bank to guarantee checks drawn on it by one having no funds deposited with the bank. (*Bowen v. Needles Nat. Bank et al.*, 94 Fed. Rep., 925.)
- 7 (U. S. C. C. A., 1897). The act of Congress authorizing the organization of national banks confers upon them no authority, either in express terms or by implication, to guarantee the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature, whether executed by the cashier or the board of directors, are necessarily ultra vires. (*Commercial National Bank et al. v. Pirie et al.*, 82 Fed. Rep., 799.)
- 8 (U. S. C. C. A., 1897). The presentation by a merchant seeking to purchase goods of a written guaranty, by a national bank, of payment for any goods he may purchase, even if it implies a representation that the bank is financially sound, is not of itself a fraudulent representation, such as will justify a rescission, since the seller is chargeable with knowledge that in law such a guaranty by a national bank is ultra vires and void. (*Ib.*)
- 9 (U. S. C. C. A., 1899). A national bank has no power to lend its credit to any person or corporation, or to become guarantor of the obligations of another, except in the case of the transfer of promissory notes discounted, which is in the ordinary course of banking (*Bowen v. Needles National Bank*, 94 Fed. Rep., 925.)
- 10 (Minn., 1898). The unanimous consent of all the stockholders of a national bank is required to bind it on an accommodation guaranty. (*Ft. Dearborn Nat. Bank v. Seymour*, 73 N. W. R., 724.)
- 11 (N. H., 1882). While a national bank has no power to guarantee a contract between third persons yet it can not repudiate the contract and retain its fruits. (*Norton v. Derry Nat. Bank*, 61 N. H., 589.)

*Accommodation drafts.*

- 12 (U. S. C. C.). A national bank has no power to make accommodation drafts for a customer to be used by him as collateral security. (*Johnson v. Charlottesville National Bank*, 3 Hughes, U. S., 657.)
- 13 (Mo. Sup., 1903). Under Revised Statutes, section 5136, prescribing the powers of national banks, such a bank has no power to bind itself that a draft drawn on its customer will be paid, and when sued on such contract, it can plead ultra vires. (*First Nat. Bank of Moscow, Idaho, v. American Nat. Bank of Kansas City*, 5 B. C. 462; 72 S. W. Rep., 1059.)
- 14 (Ohio, 1899). Where a bank guaranteed the payment of a draft solely for the accommodation of a customer, it was not liable on its contract of guaranty, it being against public policy for a bank to become an accommodation party to drafts. (*Nat. Bank of Barnwell v. City Hall Bank*, 9 Ohio S. and C. P. Dec., 827.)

*Accommodation surety.*

- 15 (U. S. C. C., 1897). A contract by a national bank to indemnify one for loss incurred as surety on an attachment bond is not void on the ground of public policy, the loss having occurred, though the bond is not given for the benefit of the bank. (*Seeber v. Commercial Nat. Bank of Ogden*, 77 Fed. Rep., 957.)
- 16 (Ky., 1899). With the exception of trust and surety companies, as a general rule, no corporation has the power to become surety for another. (*M. V. Monarch Co. et al. v. Farmers and Drovers' Bank*, 1 B. C., 146; Ky. court of appeals.)



## ACCOMMODATION PAPER—Continued.

## NATIONAL BANK AS INDORSER, GUARANTOR, ETC.—continued.

- 17 (Mich., 1890). National banks have no power under the banking act to enter into contracts of suretyship in which they have no interest. (*Knickerbocker v. Wilcox*, 83 Mich., 200.)
- 18 (Nebr., 1901). A cashier of a national bank has no authority, merely by virtue of his office, to obligate the bank upon an undertaking in replevin in a cause wherein the bank has no interest. (*Sturdevant et al. v. Farmers and Merchants' Bank of Rushville et al.*, 4 Banking Cases, 49; 62 Nebr., 472; 87 N. W. Rep., 186.)
- 19 (Nebr., 1901). It is not within the powers of an incorporated State bank to pledge its credit as a mere matter or accommodation by executing undertakings in judicial proceedings. (Ib.)
- 20 (Nebr., 1901). Where an incorporated bank becomes surety in such an undertaking, no estoppel to assert want of power to incur the obligation arises solely upon the ground that other parties have been misled, and acted in reliance thereon to their disadvantage, since the obligation was so clearly ultra vires that the parties must have known it, and taken their chances of the corporation carrying it out. (Ib.)
- 21 (Nebr., 1901). In such cases the corporation will be held estopped only where it has acquired money or property by means of the contract in excess of its powers, and having retained the same or the proceeds thereof, sets up want of power against the party seeking to enforce it. (Ib.)

## RIGHTS OF HOLDERS OF ACCOMMODATION PAPER OF NATIONAL BANKS.

*Holders with notice.*

1. The accommodation paper of a national banking association is ultra vires, and void in the hands of one who takes it with knowledge of its character.  
(U. S. C. C., 1898) *Bowen v. Needles Nat. Bank*, 87 Fed. Rep., 430;  
(U. S. C. C.) *Johnson v. Charlottesville National Bank*, 3 Hughes, U. S., 657.
2. Where a party knowingly takes as collateral security drafts of a national bank, drawn for the accommodation of a customer, he can not recover in a suit against the bank in the hands of a receiver.  
(U. S. C. C.) *Johnson v. Charlottesville National Bank*, 3 Hughes, U. S., 657;  
(U. S. C. C., 1898) *Bowen v. Needles Nat. Bank*, 87 Fed. Rep., 430; 1 Banking Cases, 644.
- 3 (U. S. C. C., 1898). Accommodation indorsements or acceptances by a national bank are ultra vires, and void in the hands of holders with notice. (*Bowen v. Needles Nat. Bank*, 87 Fed. Rep., 430.)

*Holders without notice.*

(U. S. C. C.). A national bank's accommodation indorsement of commercial paper or its accommodation draft is valid in the hands of a bona fide holder. (*Johnson v. Charlottesville National Bank*, 3 Hughes, U. S., 657.)

## WHEN BANK MAY RECOVER ON ACCOMMODATION PAPER.

1. The mere knowledge on the part of the officers of the bank, when discounting paper, that it was drawn for accommodation, will not prevent the bank from recovering thereon.  
(U. S. Sup. Ct. 1899) *Israel v. Gale*, 1 Banking Cases, 705; 174 U. S., 391;  
(U. S. C. C.) *Molson v. Hawley*, 1 Blatch., U. S., 409;  
(U. S. C. C., 1888) *Union Bank v. Crine*, 33 Fed. Rep., 809;  
(U. S. C. C., 1888) *Armstrong v. Scott*, 36 Fed. Rep., 63.
- 2 (U. S. C. C. A., 1898). A national bank receiver can not recover upon notes made for the accommodation and sole benefit of the bank, without consideration. (*Stapylton v. Teague*; same *v. Anderson et al.*; same *v. Carmichael*, 85 Fed. Rep., 407.)

## ACCOMMODATION PAPER—Continued.

## WHEN BANK MAY RECOVER ON ACCOMMODATION PAPER—continued.

- 3 (U. S. C. C., 1895). A note given without consideration to a bank for the purpose of deceiving the Government or the creditors and stockholders can be collected by the receiver. (*Pauly v. O'Brien*, 69 Fed. Rep., 460.)
- 4 (U. S. C. C., 1888). The fact that one who signed as maker of a note was in fact only an accommodation maker, and signed, without consideration, in order that the indorser, who was really the principal debtor, might get the note discounted, and that these facts were known to the bank which discounted the note at the time of discounting, is no defense for such accommodation maker in an action on the note. (*Armstrong v. Scott et al.*, 36 Fed. Rep., '63.)
- 5 (U. S. C. C., 1888). In an action upon a negotiable promissory note, brought by the indorsee against the maker, it appeared that the note had been given to the indorser as accommodation paper, under an express agreement that defendant should not be held liable on the note. *Held*, that defendant could not take advantage of the agreement against a bona fide purchaser for value, before maturity, unless it appeared that at the time of the purchase he knew of the agreement. (*Union Bank v. Crine*, 33 Fed. Rep., 809.)
- 6 (U. S. C. C. A., 1895). One L made a note, and delivered it to the payee, upon an express agreement that it should be sold and discounted by the payee for cash, which should be paid over to L. Instead of so doing, the payee diverted the note, which passed through the hands of several parties, who had notice of the diversion, and who severally indorsed the note. The last of these parties, the D Co., had the note discounted at its bank, which had no notice of the diversion, and received and used the proceeds. The note not being paid, the bank, at the request of the D Co., sued the maker and all the indorsers except the D Co. *Held*, that the fact that the bank had discounted the note solely in reliance on the credit of the D Co., and that it had omitted to sue that company, in reliance upon the company's paying the note if not collected from the maker or prior indorsers, though it enabled the D Co. to obtain an unfair advantage, was not a defense to the action. (*Germania Bank of New York v. La Follette et al.*, 72 Fed. Rep., 145.)
- 7 (U. S. C. C., 1895). A director and stockholder of a national bank gave an accommodation note to the bank's president, on the latter's request and representation that the note was to be put in the hands of his personal creditor as security, and on condition that no money should be drawn on the note, and that the note should not be put in the bank. Without the knowledge of the maker, he being aged and infirm of sight, the note was made payable to the bank and placed therein, and a certificate of deposit for the amount thereof issued to the president, and by him deposited with his creditor, who held the same until the bank's failure. *Held*, that the maker's stipulation that the note should not be used to take money from the bank was apparently made for the bank's benefit, and that having given a valid accommodation note he was liable on the note to the bank's receiver. (*Linn County National Bank v. Crawford*, 69 Fed. Rep., 532.)
- 8 (Ala., 1894). A private corporation can not defend an action on its accommodation note on the ground of ultra vires as against a bona fide holder. (*Florence Railroad and Improvement Company v. Chase National Bank*, 17 So., 720; 106 Ala., 364.)
- 9 (Ky., 1901). Accommodation indorsers of a note made payable to themselves can not escape liability to plaintiff bank on the ground that the note was delivered by them to the vice-president and general manager of the bank upon the faith of his agreement that the note was not to be accepted or discounted by him for the bank until it had been indorsed by another person, as the bank is to be regarded as the payee, and a note can not be delivered to the payee as an escrow;

## ACCOMMODATION PAPER—Continued.

## WHEN BANK MAY RECOVER ON ACCOMMODATION PAPER—continued.

- but defendant may, by counter claim, recover damages for breach of the agreement. (*Dils v. Bank of Pikeville*, 3 Banking Cases, 206; Ky. Court of Appeals, 60 S. W., 715.)
- 10 (Mass., 1896). Where signatures of defendants were obtained either as makers or indorsers of certain notes for the supposed accommodation of certain persons to whom they looked for indemnity, the fact that the notes were fraudulently obtained for the use of the cashier of a bank, who discounted them with the bank's funds, and applied the proceeds to his own use, does not render the bank chargeable with a knowledge of the fraud, and it is an owner in good faith of the paper which it took for value and before maturity. (*Indian Head National Bank v. Clark*, Mass., 43 N. E., 912; 166 Mass., 27.)
  - 11 (N. Y., 1890). In an action by a bank on a note it appeared that the defendant, a resident of New York, made the note for the accommodation of the payees, residents of another State, who indorsed it to plaintiff, situated in the same State. The indorsers were afterwards discharged in insolvency proceedings, in which plaintiff proved the note as a claim and received a dividend thereon. *Held*, that the maker was not discharged from liability, since the indorsers would have been discharged as to plaintiff if it had not appeared and taken the dividend, and defendant was not injured thereby. (12 N. Y. S., 401, affirmed; *Third National Bank v. Hastings*, N. Y. App., 32 N. E., 71; 58 Hun, 531; 134 N. Y., 501.)
  - 12 (N. Y. Sup.). The maker of a note can not assert as a defense thereto against the payee, a bank, that he signed the note at the request of the cashier and teller of the bank, who stated that they wished to use his name in stock speculations, for which purpose the notes would be discounted by the bank; that their names could not appear because of their official connection with the bank; and that he should not be charged with any of the notes given nor credited with anything received on the sale of the stock; and that the bank would take care of the notes as they became due, an agreement that a note given for a proper consideration shall not be collected being nugatory. (*Mead v. National Bank of Pawling*, 34 N. Y. S., 1054.)
  - 13 (Pa. Sup., 1896). Where the maker of a note gives to the bank which discounts it a mortgage as collateral security on the express condition that it shall not be recorded unless the bank shall thereafter consider it necessary, the failure of the bank to record the mortgage until too late to realize anything thereon will not discharge the accommodation indorser from liability on the note. (*Allentown National Bank v. Trexler*, 34 A., 195; 174 Pa. St., 497.)
  - 14 (Pa.). When the payee of an accommodation check, given for a particular purpose, deposits it in a bank in his own name and the bank makes advances and extends credit on the faith of the deposit without notice of the trust, its rights and equities are superior to the drawer of the check. (*Erisman v. Delaware County National Bank*, 1 Pa. Super. Ct., 144; 37 W. N. C., 518.)
  - 15 (Tex.). Where a note was signed by accommodation makers, and made payable to a bank on the understanding that it was to be deposited in the bank to secure a loan for the purchase of wheat for a mill, with the ultimate intention of paying off a mortgage on the mill, and such makers, without notice to the bank of any restrictions on the disposition of the note, allowed the mortgagor, for whose benefit it was made, to have possession and control thereof, they can not complain that he effected an immediate payment of the mortgage by procuring an indorsement to himself from the bank, and then indorsing the note to the mortgagee. (*First National Bank v. Wood*, Tex. Civ. App., 28 S. W., 384; 8 Texas Civ. App., 554.)
  - 16 (Wis., 1902). The directors of a bank, on examining its loans, found a note signed by its cashier as a joint maker, who, on his attention being called thereto, stated that defendant was to indorse the note; and

## ACCOMMODATION PAPER—Continued.

## WHEN BANK MAY RECOVER ON ACCOMMODATION PAPER—continued.

he was called in and indorsed it. *Held*, that the fact that the defendant received no consideration therefor would not relieve him from liability on the note in the hands of the bank, as merely an accommodation indorser for the bank after it had purchased the note, as the cashier had no authority to discount his own note for the bank, even if he had general authority to discount notes, and therefore the bank did not accept the note until it was indorsed by defendants, and the original consideration paid for the note attached to the indorsement. (*Bank of Monticello v. Dooley et al.*, 4 Banking Cases, 276.)

## MISCELLANEOUS.

*Holder of accommodation paper having knowledge of its character.*

- 1 (U. S. C. C. A., 1896). Accommodation paper is put into circulation for the purpose of giving credit to the party for whose benefit it is intended, and, although he can not maintain an action upon it against the accommodation maker or indorser, a purchaser can do so who acquires it while still current and gives the credit it was intended to promote, although with knowledge of its original character. (*Israel v. Gale*, 77 Fed. Rep., 532.) Affirmed by U. S. Sup. Ct. (1899)—174 U. S., 391.
- 2 (U. S. C. C. A., 1896). One who takes accommodation paper from the party for whose benefit it was made and gives him credit for the same on a precedent indebtedness, though advancing no money, is a holder of such paper for value. (*Ib.*)

*President of business corporation; authority as to accommodation paper; when holder can recover on; ultra vires.*

- 3 (U. S. C. C. A., 1898). The general authority of the president of a business corporation to make and discount its promissory notes gives him no power to make a note of the corporation payable to his own order, and one who discounts such a note can not recover thereon against the corporation without showing special authority for its execution. (*Park Hotel Co. v. Fourth National Bank of St. Louis*, 86 Fed. Rep., 742.)
- 4 (U. S. C. C. A., 1898). To the general rule that the acts and contracts of a general agent within the scope of his powers are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is, without the scope of his general powers, and no one who has notice of its character may safely recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or make the contract. (*Ib.*)
- 5 (U. S. C. C. A., 1898). It is ultra vires of a corporation to make accommodation paper or to guarantee the payment of the obligations of others. (*Ib.*)
- 6 (U. S. C. C. A., 1898). A contract which a corporation has no power to make it has no power to ratify and no power to estop itself from denying. (*Ib.*)
- 7 (Ga., 1896). Where a note executed solely for the accommodation of a bank was made payable to the order of the bank's cashier and indorsed in blank, the mere fact that the president of the bank negotiated the note for his personal benefit to a third person, who knew his office, was not of itself notice to the purchaser of the facts, or sufficient to put him on inquiry as to the legality of the president's act. (*Kaiser v. United States National Bank*, Ga., 25 S. E., 620; 99 Ga., 258.)

*Power of corporation to make or indorse accommodation paper.*

- 8 (N. Y.). In the absence of statutory or charter authority a corporation has no power, either directly or incidental, to bind itself by making

## ACCOMMODATION PAPER—Continued.

## MISCELLANEOUS—continued.

or indorsing negotiable instruments for the accommodation of the makers, even for a consideration paid. (*National Park Bank v. German American Mut. W. and S. Co.*, 116 N. Y., 281.)

*Rediscount by bank when not accommodation indorser.*

- 9 (N. Y., 1895). In an action on a note, it appeared that plaintiff bank discounted P. & Co.'s paper to the full extent consistent with its rules, and, in reply to an application for a further discount, suggested that the company get defendant bank to discount the paper and allow plaintiff to rediscount it. The company made its note to defendant, who indorsed it, and sent it on to plaintiff, with whom it had an account, and the proceeds were placed to defendant's credit. Defendant placed the amount of the note to the credit of P. & Co., by whom it was at once checked out. This specific amount credited to defendant by plaintiff was not checked out by defendant, but checks in various amounts, in ordinary course of business, were drawn against its account, none of which apparently had any special reference to the amount of the discount. *Held*, that defendant was not an accommodation indorser. (*Fox v. Home Co.*, Sup., 35 N. Y. S., 896, distinguished; *Tradesmen's National Bank v. Bank of Commerce*, Sup., 39 N. Y. S., 554.)

*Action on accommodation paper; insufficient answer.*

- 10 (N. Y., 1894). An answer which alleges that the note sued on was accommodation paper, and was made and delivered on condition that defendants should not be held liable thereon, provided there was delivered to plaintiff good business paper of the person accommodated, is insufficient, because it does not allege that the agreement to replace such note with other paper was made with plaintiff. (*Vilas National Bank v. Barnard*, Sup., 28 N. Y. S., 922.)

*Filling out blanks in accommodation paper.*

- 11 (N. Y., 1894). Defendant, for the accommodation of the maker, indorsed blank notes in the following form: "——— after date, —— promise to pay to the order of ——, at the Farmers' National Bank, Adams, N. Y. Value received." *Held*, that the delivery of the indorsed blanks did not authorize the holder to fill them out so as to make them payable "on demand" instead of at a specified time after date, or to add the words "with interest." *Farmers' National Bank v. Thomas*, Sup., 29 N. Y. S., 837.)

*Insane maker of accommodation paper; when not released.*

- 12 (Tenn. Sup., 1896). An accommodation indorser on a note given in renewal of a note on which he was also accommodation indorser, at its maturity, is not relieved of liability because of his insanity at time of signing it, the bank taking it in renewal having no notice of his insanity, and he having been sane when the prior note was executed. (*Memphis National Bank v. Sneed*, 36 S. W., 716; 97 Tenn., 120.)

## ACTIONS.

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## AGENT OF SHAREHOLDERS.

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*Who may be agent.*

- 1 (U. S. C. C., 1897). The president, director, or clerk of a national bank may be the agent of the shareholders. (*United States v. Jewett*, 84 Fed. Rep., 142. Affirmed in *Jewett v. U. S.*, 100 Fed. Rep., 832.)

*Effect of appointment of agent.*

- 2 (U. S. C. C., 1897). A national banking association is not terminated by the appointment of an agent, but the powers of its officers are limited thereby. (*United States v. Jewett*, 84 Fed. Rep., 142.)

*Agent stands in same relation as receiver.*

3. Twenty-seventh United States Statutes at Large, 345, chapter 360, section 3, authorizes the election of an agent by the stockholders of a national bank in the hands of a receiver when all indebtedness to outside creditors has been paid, and provides that such agent, after giving bond, shall be vested with the control of the bank's affairs by the Comptroller and receiver, being accountable to the circuit or district court of the United States.  
(U. S. Sup. Ct., 1897) *Ex parte Chetwood*, 165 U. S., 443;  
(U. S. C. C., 1888) *McConville v. Gilmour et al.*, 36 Fed. Rep., 277;  
(Calif., 1896) *Chetwood v. California National Bank*, 45 Pac. Rep., 854; 113 Cal., 414, 649.

*Embezzlement by agent.*

- 4 (U. S. C. C., 1897). The agent of shareholders of a national bank in liquidation is criminally liable for embezzlement under the national bank act. (*United States v. Jewett*, 84 Fed. Rep., 142.)

*Agent takes assets under an express trust for benefit of creditors.*

- 5 (U. S. C. C. A., 1904). Where the insolvency of a national bank was accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors. (*George et al. v. Wallace et al.*, 135 Fed. Rep., 286.)

*Disbursements of assets by agent.*

- 6 (S. C., 1892). An agent must reimburse the stockholders who have paid assessments before distributing assets to those who have not paid, though the shares of the latter are in the hands of purchasers, without notice of such nonpayment. (*Richardson v. Wallace*, 39 S. C., 216.)

*Federal courts have same jurisdiction of agents as of receivers.*

- 7 (U. S. C. C. A., 1900). An action by or against an agent of the shareholders of a national bank, chosen by them in pursuance of "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, and its amendments (19

## AGENT OF SHAREHOLDERS—Continued.

Stat. L., 63, c. 156; 27 Stat. L., 345, c. 360; 29 Stat. L., 600, c. 354), is a suit arising under the laws of the United States, of which a Federal court has jurisdiction, under sections 1 and 2 of the acts of 1887-88 (25 Stat. L., 434). (*Guarantee Co. of North Dakota v. Hanway*, 104 Fed. Rep., 369.)

- 8 (U. S. C. C. A., 1900). Such an action is also a cause for winding up the affairs of a national bank, and is by or against an officer thereof, and hence cognizable by a Federal court, under the last clause of section 4 of the acts of 1887-88 (25 Stat. L., 436). (Ib.)
- 9 (U. S. C. C. A., 1900). For the reasons above stated, an action by or against an agent of the shareholders of a national bank is removable from a State to a Federal court. (Ib.)
- 10 (U. S. C. C., 1888). The Federal courts have the same jurisdiction of suits by and against the "agents" of national banks appointed under the national banking acts of Congress, when the "receivers" of an insolvent bank have been displaced by such "agents," as they have of suits by and against the "receivers" of such banks, each being in the same sense officers of the United States, and each representing in precisely the same relation the bank in its corporate capacity; and this jurisdiction attaches without regard to any diversity of citizenship of the parties or the amounts involved. (*McConville v. Gilmour et al.*, 36 Fed. Rep., 277.)

*When action in Federal court will not bar action in State courts.*

- 11 (U. S. Sup. Ct., 1897). That a receiver of an insolvent national bank has applied to the proper circuit court for authority to sell assets, and that thereafter an agent has been appointed, under 19 Statutes, 63, as amended by 27 Statutes, 345, to succeed the receiver, gives that court no authority to enjoin a stockholder in the bank from prosecuting actions in the State courts, in behalf of the bank, against its directors, or against using the bank's name in writs of error sued out from the United States Supreme Court to review the judgments of the State supreme court in such actions. (*Ex parte Chetwood*, 165 U. S., 443.)

*Parties, substitution for receiver.*

- 12 (U. S. Sup. Ct., 1897). A duly elected "agent" who is substituted under the act of June 30, 1876 (19 Stat. L., 63), as amended by the act of August 3, 1892 (27 Stat. L., 345), for the receiver of an insolvent national bank to complete the winding up of its affairs, proceeds with like authority to that of the receiver, and is not an officer of the circuit court, though he is required by the statute to render an account to it of all his proceedings, expenditures, etc., and he and his sureties are finally discharged by its order. (*Ex parte Chetwood*, 165 U. S., 443.)
- 13 (U. S. C. C., 1888). When the receiver of an insolvent national bank has been displaced by an "agent" appointed under the acts of Congress in that behalf, it is proper practice to substitute, upon motion, the "agent" as the plaintiff on the record in place of the "receiver" in a suit already commenced by the latter. (*McConville v. Gilmour et al.*, 36 Fed. Rep., 277.)

*When agent can not sue shareholder.*

- 14 (U. S. C. C. A., 1902). Where a national bank goes into voluntary liquidation, the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by act June 30, 1876 (19 Stat., 63), by a suit in equity in the nature of a creditors' suit brought on behalf of all creditors in a court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should



## AGENT OF SHAREHOLDERS—Continued.

be authorized by the court of original jurisdiction, and brought by a receiver or other person appointed by such court. (*Williamson v. American Bank et al.*, 115 Fed. Rep., 793.)

- 15 (U. S. Dist. Ct., 1897). An agent chosen by stockholders to take charge of the business of a national bank in liquidation can not, after all debts have been paid, enforce the individual liability of stockholders, under Revised Statutes, sections 5151, 5234, as he has no greater powers than those conferred upon the receiver. (*Church v. Ayer*, 80 Fed. Rep., 543.)

*When agent entitled to proceeds of stockholder's suit.*

- 16 (Cal., 1896). Where an action brought by a stockholder in a national bank, in behalf of the corporation while in the hands of a receiver, has terminated, an agent of the corporation elected to succeed the receiver as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees. (*Chetwood v. California National Bank*, 45 P., 854; 113 Cal., 414-649.)

*When agent may sue shareholder.*

- 17 (Tex., 1898). The liquidating agent of a national bank may sue a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. (*Norwood v. Interstate Nat. Bank*, 45 S. W. Rep., 927; 92 Tex., 268.)

*When agent may purchase.*

- 18 (Tex., 1898). One of the liquidating trustees of a national bank may purchase at the sale of the assets of the bank, he being a stockholder and the sale being at auction, after notice to all the stockholders, who alone are interested—the bank being solvent. (*Cage v. Shapard*, 46 S. W. Rep., 839; 19 Tex. Civ. App., 206.)

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## QUESTIONS CONSIDERED ON APPEAL.

- 1 (U. S. Sup. Ct., 1890). Where the case is tried by the circuit court without a jury, and it makes a special finding of facts, with conclusions of law, alleged errors of fact are not, on a writ of error, subject to

## APPEAL—Continued.

## QUESTIONS CONSIDERED ON APPEAL—continued.

- revision by this court, if there was any evidence on which such findings could be made. (*Hathaway v. First National Bank of Cambridge*, 134 U. S., 494.)
- 2 (U. S. Sup. Ct., 1890). Where the circuit court finds ultimate facts which justify the judgment rendered, its refusal to find certain specified facts, and certain propositions of law based on those facts, will not be reviewed by this court, on a writ of error, if they were either immaterial facts or incidental facts, amounting only to evidence bearing on the ultimate facts found. (Ib.)
  - 3 (U. S. C. C. A., 1896). When the finding in the circuit court involves mixed questions of law and fact, and is general in its form, nothing is open to review in the circuit court of appeals except the rulings made in the progress of the trial, the findings being conclusive as to the facts. (*Humphreys v. Third National Bank of Cincinnati, Ohio*, 75 Fed. Rep., 852.)
  - 4 (U. S. C. C. A., 1896). When a jury is waived in the circuit court, a party wishing to raise any question of law upon the merits in the court above should request special findings of fact, framed like the verdict of a jury, and reserve his exceptions to those special findings if he deems them not sustained by the evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. (Ib.)
  - 5 (U. S. C. C. A., 1901). When a peremptory instruction is given in favor of either party, the only question with respect to the charge which is open for consideration by an appellate court is whether such direction to find for one party or the other, when considered in the light of the pleadings and all the evidence, was right. Assignments of error as to other matters contained in the charge are in such case immaterial. (*Modern Woodmen of America v. Union Nat. Bank of Omaha*, 108 Fed. Rep., 753.)

*Second appeal in same suit—Questions reviewable.*

- 6 (U. S. C. C. A., 1903). A second appeal to the circuit court of appeals in the same suit brings up for consideration only the proceedings of the circuit court after the mandate was sent down on the first appeal, and no question decided on such appeal can be reviewed. (*Montgomery Co. v. Cochran et al.*, *Cochran et al. v. Montgomery Co.*, 126 Fed. Rep., 456.)
- 7 (Va., 1902). When there have been two trials of an action at law, and the verdict of the jury on the first has been set aside by the trial court, and proper exception taken, and the evidence certified, the appellate court will examine the proceedings and evidence of the first trial; and if it discovers that the court erred in setting aside the verdict it will annul all subsequent proceedings and render judgment thereon. (*Wood v. American Nat. Bank*, 40 S. E. Rep., 931; 100 Va., 306.)

## QUESTIONS NOT CONSIDERED ON APPEAL.

- 1 (U. S. Sup. Ct., 1901). To render a Federal question available on writ of error to a State court, it must have been raised in the case before judgment, and can not be claimed for the first time in a petition for rehearing. (*Turner, Syndic., etc., v. Richardson, Receiver, etc.*, 3 Banking Cases, 232; 180 U. S., 87.)
- 2 (U. S. Sup. Ct., 1891). Upon writ of error no error in law can be reviewed which does not appear upon the record or by bill of exceptions made a part of the record. (*Claasen v. United States*, 142 U. S., 140.)
- 3 (U. S. C. C. A., 1894). An objection and exception to the introduction of certain evidence, for which no ground was assigned, can not be considered on appeal. (*Tabor v. Commercial National Bank of Cleveland*, 62 Fed. Rep., 383.)

## APPEAL—Continued.

## QUESTIONS NOT CONSIDERED ON APPEAL—Continued.

- 4 (U. S. C. C. A., 1894). On a trial by the court, where no request was made for a peremptory declaration that the evidence was insufficient to entitle plaintiff to judgment, a general finding for plaintiff can not be reviewed on a single exception to the finding and the judgment thereon. (Ib.)
- 5 (U. S. C. C. A., 1901). Special findings made by a jury, as authorized by the State practice, have the same weight and effect as special findings of fact by the court where a jury has been waived, and can not be reviewed by the appellate court for the purpose of determining whether there was any evidence to support them, where the bill of exceptions does not state affirmatively that it contains all the evidence. (*Metropolitan Nat. Bank v. Jansen et al.*, 108 Fed. Rep., 572.)
- 6 (U. S. C. C. A., 1898). When a case goes twice to an appellate court, questions decided upon the first occasion will not be considered upon the second. (*Mohrenstecher et al. v. Westervelt*, 87 Fed. Rep., 157.)
- 7 (U. S. C. C. A., 1898). Under rule 11 of the circuit court of appeals (21 C. C. A., cxi, and 78 Fed. Rep., cxi), requiring the assignment of errors to quote the full substance of evidence alleged to have been erroneously admitted or rejected, and to set out the part of the charge referred to *totidem verbis*, assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can only be ascertained by a careful reading of a voluminous record, and that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered. (*Gallot v. United States*, 87 Fed. Rep., 446.)
8. A finding on conflicting evidence can not (on appeal) be disturbed.
  - (Cal., 1896.) *Smith v. Sabin*, 43 P., 588;
  - (Ill., 1896.) *Lehman v. Rothbarth*, 42 N. E., 777; 159 Ill., 270;
  - (Nebr., 1899.) *Schmelling v. State et al.*, 1 Banking Cases, 670; 57 Nebr., 562;
  - (Nebr., 1896.) *Buffalo County National Bank v. Gilcrest*, 66 N. W., 850; 47 Nebr., 897;
  - (Tex., 1896.) *Merchants' National Bank v. McNulty*, 33 S. W., 963; 89 Tex., 124.
- 9 (Conn., 1901). Where answers to questions objected to are not prejudicial to the objecting party, error in allowing them to be answered is harmless, and will not be considered on appeal. (Appeal of Main., 3 Banking Cases, 437.)
- 10 (Ill. Sup., 1894). Where no question of law is presented by the record a certificate by the appellate court that the case involves questions of law of such importance that they should be passed on by the supreme court does not present any questions of law to be determined. (*Commercial National Bank v. Cauniff*, 37 N. E., 898; 151 Ill., 329.)
- 11 (Ill. Sup., 1894). In determining the questions at issue the supreme court can only look at the record and not at the opinion of the appellate court. (Ib.)
- 12 (Me., 1900). Exceptions do not lie to rulings that fail to raise any question of law. (*Hatch v. First Nat. Bank of Dexter*, 3 Banking Cases, 191; 94 Me., 348; 47 Atl. Rep., 908.)
- 13 (Nebr., 1899). Questions of which there is no assignment in the petition in error will not be considered on review. (*Stuart v. Bank of Staplehurst*, 1 Banking Cases, 518; 57 Nebr., 569.)
- 14 (Nebr., 1901). Where, on appeal in an action in equity, the decree rendered is reversed and remanded for want of sufficient evidence to sustain it, and on a second trial de novo additional and material evidence is introduced, and an appeal again taken, the second appeal is to be considered on the record then presented, uninfluenced by the prior decision on the question of the sufficiency of the evidence.

## APPEAL—Continued.

## QUESTIONS NOT CONSIDERED ON APPEAL—continued.

(First Nat. Bank of Sutton *v.* Grosshans et al., 3 Banking Cases, 283; 61 Nebr., 575; 85 N. W. Rep., 542.)

- 15 (N. Y., 1896). An order requiring an answer to be made more definite, so as to show what is pleaded as defense and what as counterclaim, rests in discretion, and is not appealable. (*Garfield National Bank v. Kirchway*, City Ct. N. Y., 37 N. Y. S., 1140.)

## PRESUMPTIONS ON APPEAL.

- 1 (U. S. Sup. Ct., 1897). Where the circuit court and the circuit court of appeals agree as to what facts are established by the evidence, this court will not take a different view unless it clearly appears that the facts are otherwise. (*Stuart v. Hayden*, 169 U. S., 1; *Gruetter v. Stuart*, *Id.*)
- 2 (U. S. C. C. A., 1900). An agreed statement of facts on which a judgment is rendered will be treated on appeal as the equivalent of a special finding as to the ultimate facts stated therein, but as to the inferences to be drawn from the facts stated, which are merely evidentiary, the general finding is conclusive. (*Wilson v. Merchants' Loan and Trust Co. of Chicago*, Ill., 98 Fed. Rep., 688.)
- 3 (Ala., 1898). Where a case was tried upon parol evidence, on appeal, it is the rule to indulge all reasonable presumptions in favor of the decision of the trial court upon questions of fact, and not to reverse unless it clearly appears to be erroneous. (First Nat. Bank of Cambridge, Ill., *v.* Hall et al., 1 Banking Cases, 198; 119 Ala., 64.)
- 4 (Cal., 1894). Where, on appeal, the record does not contain the evidence, and findings of fact were waived, it will be presumed that the allegations of the complaint were proven, and that the affirmative allegations in the answer were not. (*Ulrich v. Santa Rosa National Bank*, Cal., 37 P., 500; 103 Cal., XVIII.)

## APPEAL, WHEN DISMISSED.

- 1 (U. S. Sup. Ct., 1899). A decree of the circuit court was reversed by the circuit court of appeals in a decree containing specific directions, and the circuit court entered a decree in conformity with such directions, and an appeal therefrom was prayed to the circuit court of appeals, which was dismissed. The second decree of the circuit court was entered before an appeal from the first decree of the circuit court of appeals was presented to the Supreme Court. *Held*, that this promptness of action did not cut off such appeal to the Supreme Court, and any difficulty on the part of the Supreme Court in dealing with the cause in the circuit court was obviated by an appeal from the action of the circuit court of appeals in dismissing an appeal from the second decree of the circuit court, which brought before the Supreme Court the record subsequent to the first decree of the circuit court of appeals. (*Merrill v. National Bank of Jacksonville* (two cases), 173 U. S., 131; 1 Banking Cases, 210.)
- 2 (U. S. C. C. A., 1897). A writ of error which has been allowed, served, and returned to the appellate court with the transcript of the proceedings in the trial court will not be dismissed because the clerk of the trial court has inadvertently failed to make an indorsement of its filing on the writ itself. *Insurance Co. v. Phinney*, 22 C. C. A., 425; 76 Fed. Rep., 617, disapproved. (*United States National Bank v. First National Bank of Little Rock* et al., 79 Fed. Rep., 296.)
- 3 (U. S. C. C. A., 1896). An appeal taken to the circuit court of appeals from a decree of the circuit court entered in accordance with the mandate of the former court upon a previous appeal will be dismissed, even though an appeal lie to the Supreme Court from the decision of

## APPEAL—Continued.

## APPEAL, WHEN DISMISSED—continued.

the circuit court of appeals. (*Merrill v. National Bank of Jacksonville*, 78 Fed. Rep., 208.)

- 4 (Wash., 1896). Where the record fails to show that notice of appeal was given, the appeal will be dismissed. (*Merchants' National Bank v. Ault*, Wash., 44 P., 129; 14 Wash., 701.)

## MISCELLANEOUS.

*Evidence on appeal.*

- 1 (Wis., 1896). Where, on the issue of a fraudulent preference of a creditor, the verdict and findings cover all the material, controverted, and issuable facts, a party can not urge, on appeal, certain transactions in evidence from which a preference might have been found, where there was no request for the trial court to submit them to the jury for determination. (*Continental National Bank of Chicago v. McGeoch*, Wis., 66 N. W., 606; 92 Wis., 286.)

*Bill of exceptions, when unnecessary.*

- 2 (U. S. C. C. A., 1896). It is not indispensable that an exception to a ruling of the court on the trial of an action should be brought before an appellate court by a bill of exceptions if it fully appears upon the record proper. (*Wilson v. Pauly*, 72 Fed. Rep., 129.)

*Bill of exceptions, insufficient authentication.*

- 3 (Nebr., 1896). Where the bill of exceptions purporting to contain the evidence in a case is not authenticated by the certificate of the clerk of the trial court it will not be examined. (*First National Bank v. Cass County*, Nebr., 66 N. W., 300; 47 Nebr., 172.)

*Writs of error, limitation.*

- 4 (U. S. C. C. A., 1895). Under act March 3, 1891, § 11, a writ of error must be sued out within six months in order to authorize a review by the circuit court of appeals. (*White et al. v. Iowa National Bank of Des Moines*, 71 Fed. Rep., 97.)

*Consolidation of causes on appeal.*

- 5 (Tex. Sup., 1896). As each party may appeal from the same final judgment without making separate cases of each appeal, the appellate court may consolidate into one proceeding separate cases on appeal from the same judgment. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.*, 34 S. W., 737; 89 Tex., 331.)

*Error waived.*

- 6 (Wash., 1894). Where, in an action against a firm on a note signed by one partner, the court tried the case without a jury and found that such partner had no authority to sign the note, but also found that the other partner afterwards ratified the signature, error in admitting evidence as to the former's authority to sign the note is immaterial. (*Merchant's National Bank v. Peet*, Wash., 37 P., 290; 9 Wash. 237.)

*Modification of judgment after affirmation.*

- 7 (U. S. C. C. A., 1896). Where an order refusing to dissolve an injunction pendente lite restraining a sheriff from selling certain silks on execution was affirmed, but it appeared to the court that a sale of the goods would be to the pecuniary advantage of both parties, *held*, that leave would be reserved to the court below to modify its order so that by consent of the parties the silk might be sold under the execution, after ample notice, and the proceeds placed in the registry to await a final decision. (*Hadden et al. v. Dooley et al.*, 74 Fed. Rep., 429.)

*Intervening petition under Louisiana Code.*

- 8 (U. S. C. C. A., 1896). Under the Louisiana code of practice providing (articles 364, 391) that third persons may intervene in suits, either before or after issue, provided the intervention does not retard the

## APPEAL—Continued.

## MISCELLANEOUS—continued.

suit, but that persons so intervening must be always ready to plead or exhibit their testimony, an appellate court can not review the exercise of discretion by the trial court in refusing an application by such an intervener, made after the commencement of a trial, for a continuance, in order to enable the intervener to take steps necessary to bring his intervention to an issue. It is not error to refuse to admit evidence offered by such an intervener when his intervention has not been brought to an issue with the original parties. (Baker v. Texarkana National Bank et al., 74 Fed. Rep., 598.)

*Rehearing.*

- 9 (Fla., 1895). A rehearing will not be granted for consideration of a question not raised on the original hearing. (Arnau v. First National Bank, 18 So., 790; 36 Fla., 395.)

*Practice.*

- 10 (U. S. Sup. Ct., 1891). In a criminal case a general judgment upon an indictment containing several counts and a verdict of guilty on each count can not be reversed on error if any count is good and is sufficient to support the judgment. (Claasen v. United States, 142 U. S., 140.)
- 11 (Nebr., 1900). A petition which is attacked for the first time in this court on the ground that it does not state a cause of action will be liberally construed. (Omaha Nat. Bank v. Kiper et al., 2 Banking Cases, 419; 60 Nebr., 33.)

*Appealable decree.*

- 12 (U. S. C. C. A., 1901). A decree which determines the validity of a trust deed is final and appealable as to the trustee and beneficiary in such deed, although it is interlocutory only as to other matters involved in the suit, in which such parties have no interest. (Kemp et al. v. Nat. Bank of the Republic of New York, 109 Fed. Rep., 48.)

*Parties to appeal.*

- 13 (Mich., 1901). Where the decree in an interpleader's suit commenced by a bank to determine the right of a deposit relieves the bank from all liability on the payment of the fund into the court, and an appeal from the decree is dismissed, the bank is not a proper party to an appeal from the final decree, determining the right of the fund as between the claimants. (Detroit Sav. Bank v. Haines et al., 3 Banking Cases, 648; 128 Mich., 38.)

*Appeal—Assignment of errors—Filing before allowance of appeal indispensable.*

- 14 (U. S. C. C. A., 1904). The filing of an assignment of errors before or at the time of the allowance of an appeal is indispensable, under the eleventh rule of the circuit courts of appeals (91 Fed. vi, 32 C. C. A., lxxxviii), and the appeal will be dismissed if the assignment is not thus filed. (Simpson v. First National Bank of Denver; First National Bank of Denver v. Simpson, 129 Fed. Rep., 257.)

*Same—Conditional allowance.*

- 15 (U. S. C. C. A., 1904). An allowance of an appeal on condition that the petitioner give a bond in a fixed amount does not become an allowance of the appeal until the bond is given and accepted, and the filing of an assignment of errors before or at the time of the giving and acceptance of the bond is a filing within the time prescribed by the rule. (Ib.)

*Appeal matter of right—Allowance of writ of error matter for judicial determination.*

- 16 (U. S. C. C. A., 1904). An appeal is a matter of right, secured by act of Congress upon compliance with the statutes relative to security and with the rules of the courts. The allowance of a writ of error is a matter for judicial determination upon a consideration of the sufficiency of the grounds for the writ stated in the petition and assign-

## APPEAL—Continued.

## MISCELLANEOUS—continued.

ment of errors. The reason for the rule requiring the filing of an assignment of errors before the allowance of an appeal is to give notice to opposing counsel and the appellate court of the questions of law to be discussed. In an action at law there is the additional reason that the presentation of an assignment of errors to the judge who allows or issues a writ of error is essential to his decision of the question whether or not it should be issued. (Ib.)

*Appeal—Review—Harmless error.*

- 17 (U. S. C. C. A., 1904). The erroneous admission of evidence in corroboration of the testimony of an unimpeached and uncontradicted witness, and in respect to a mere matter of detail, is not ground for reversal. (*First National Bank of Houston v. Wells, Fargo & Co.*, 127 Fed. Rep., 818.)

## ASSESSMENT. (See SHAREHOLDERS.)

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## ATTACHMENT OF NATIONAL BANK NOT ALLOWED.

[The courts in New York held for some time that the prohibition in section 5242, Revised Statutes, United States, only applied to cases of actual or pending insolvency, but it has been definitely settled by the Supreme Court of the United States in the cases of *Butler v. Coleman*, 124 U. S., 721, and *Pacific Nat. Bank v. Mixter*, 124 U. S., 721, that an attachment prior to final judgment against a national bank is wholly void whether issued by a State or Federal court.

This decision has been followed by the New York courts in the case of *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp., 852; 112 N. Y., 667, overruling former decisions.]

- 1 (U. S. Sup. Ct., 1888). Section 5242, Revised Statutes, United States, stands as the paramount law of the land that attachments shall not issue from State courts against national banks, and writes into all State attachment laws an exception in favor of national banks. The effect of the act of Congress is to deny the State remedy altogether so far as suits against national banks are concerned, and in this way it operates as well on the courts of the United States as on those of the States. Although the provision was evidently made to secure



## ATTACHMENT—Continued.

## ATTACHMENT OF NATIONAL BANK NOT ALLOWED—continued.

equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and can not be used under any circumstances. (*Pacific National Bank v. Mixter*, 124 U. S., 721; *Butler v. Coleman*, 124 U. S., 721.)

- 2 (U. S. Sup. Ct., 1888). A bond given to release property from an illegal attachment is void. The principal in a bond given in an attachment suit may maintain an action in equity to have the bond declared void and the property held by the sureties as indemnity returned. (Ib.)
3. When a creditor attaches the property of an insolvent bank, he can not hold such property against the claim of a receiver appointed after the attachment suit was commenced. Such creditor must share pro rata with all others.  
(U. S. Sup. Ct., 1874.) *First National Bank of Selma v. Colby*, 21 Wall., 88 U. S., 609;  
(U. S. C. C.) *Harvey v. Allen*, 16 Blatch., 29.
- 4 (U. S. C. C., 1895). Where service is made on a national bank only by attachment and publication or service out of the State, the attachment, being prohibited by Revised Statutes, section 5242, should be vacated and the service set aside. (*Garner v. Second National Bank*, 66 Fed. Rep., 369.)
- 5 (N. Y. Appls., 1889). Attachment vacated and set aside on authority of *Pacific National Bank v. Mixter*, 124 U. S., 721. (*Bank of Montreal v. Fidelity National Bank*, 112 N. Y., 667. Unanimous decision of court of appeals.)
- 6 (N. Y. Appls., 1903). Revised Statutes 5242 prohibits an attachment against a national bank whether solvent or insolvent. (*Van Reed v. People's National Bank of Lebanon, Pa.*, 5 B. C., 383; 66 N. E. Rep., 16.
- 7 (N. Y., 1878). An attachment will not lie before final judgment against the property in this State of a national bank situated and doing business in another State. (*Rhoner v. National Bank of Allentown, Pa.*; *Palmer v. Same*, 14 Hun., 126; 2 N. B. C., 331.)
- 8 (N. Y., 1876). An attachment can not be issued from a State court against a national bank before final judgment, whether such bank be located in this State or not. (*Central National Bank v. Richland National Bank*, 52 Howard, 136; 1 N. B. C., 801).
- 9 (N. Y., 1883). The provision of the national banking act prohibiting attachments in such cases is not repealed by the act of Congress of July 12, 1883, providing that the jurisdiction for suits thereafter brought against national banks shall be the same as for suits against State banks and repealing laws inconsistent therewith. (*Raynor v. Pacific National Bank*, 93 N. Y., 371; 3 N. B. C., 624.)
- 10 (Ill., 1891). An attachment can not be issued by a State court against a solvent national bank of another State. (*McDonald v. First Nat. Bank*, 41 Ill. App., 368.)

[Prior to the decision of the New York court of appeals in the case of the Bank of Montreal *v. Fidelity National Bank*, following the decision of the Supreme Court of the United States in *Pacific National Bank v. Mixter* and holding that attachments against national banks are wholly void, the New York courts held (as shown below) that attachments could be issued against solvent but not against insolvent banks.]

- 11 (N. Y., 1882). An attachment from a State court may not issue against an insolvent national bank of that State. (*National Shoe and Leather Bank of the City of New York v. Mechanics' National Bank of Newark, N. J.*; *Corn Exchange Bank v. Same*; *West Side Bank v. Same*, 89 N. Y., 467; 3 N. B. C., 601.)

## ATTACHMENT—Continued.

## ATTACHMENT OF NATIONAL BANK NOT ALLOWED—continued.

- 12 (N. Y., 1883.) An attachment issued against an insolvent national bank is invalid (Rev. Stat., sec. 5242), and is not made valid by the subsequent acquisition by the bank of further capital. (*Raynor v. Pacific National Bank*, 93 N. Y., 371; 3 N. B. C., 624.)
- 13 (N. Y., 1883.) Although the bank after the issuing of the attachment paid a large amount of its debts in full, this does not estop it from questioning the validity of the attachment. (*Ib.*)
- 14 (N. Y., 1882.) A receiver of a national bank situated in another State, though not a party, may move to vacate an attachment. (*People's Bank of the City of New York v. Mechanics' National Bank of Newark*, 62 How. Pr., 422; 3 N. B. C., 670.)
- 15 (N. Y., 1882.) In an action against a national bank of another State an attachment issued against its property in this State will be vacated upon proof of its insolvency. (*Ib.*)
- 16 (N. Y., 1883.) The defendant, a national bank at Boston, Mass., on November 18, 1881, closed its doors and was put in charge of a Government bank examiner, and thus continued till March 14, 1882, when the Comptroller allowed it to resume. It transacted business till May 22, 1882, when it was placed in the hands of a receiver. An attachment was issued in this action November 19, 1881, against defendant's property in this State. At that time its assets would have paid its debts and liabilities exclusive of its capital, but it had refused to pay various legal obligations then due. *Held*, that defendant had committed acts of insolvency within United States Revised Statutes, section 5242, and the attachment should be vacated. (*Market National Bank of New York v. Pacific National Bank of Boston*, 30 Hun., 50; 3 N. B. C., 672.)

## ATTACHMENT OF SHAREHOLDERS' STOCK.

- 1 (U. S. C. C., 1881.) An unrecorded transfer of national-bank stock will take precedence of a subsequent attachment in behalf of a creditor without notice. (*Continental National Bank v. Elliot National Bank et al.*, 7 Fed. Rep., 369.)
- 2 (U. S. C. C., 1897.) The levy of an attachment on the shares of a national bank under the Vermont statutes (R. L., secs. 3261, 3262), which do not include national bank stock in their provisions, is of no effect against the defendant in attachment. (*Sowles v. National Union Bank of Swanton, Vt.*, 82 Fed. Rep., 696.)
- 3 (U. S. C. C., 1897.) It seems doubtful whether any attachment under State laws can operate as a transfer of shares of national-bank stock, since such stock exists solely under the laws of the United States, which provide for transfers and declare the effect thereof. (*Ib.*)
- 4 (Me.) The stock of a shareholder indebted to it may be attached by the association and sold on execution. (*Hagar v. Union National Bank*, 63 Me., 509.)

## ACTIONS OF ATTACHMENT, PLEADING AND PRACTICE.

*Action on attachment bond when discharged in equity.*

- 1 (U. S. Sup. Ct., 1888.) Sureties on attachment bond against national bank who have received assets of the bank to secure them from loss thereon, the obligation being illegal, will be discharged in equity and be compelled to transfer their collateral to the receiver of the bank. (*Pacific National Bank v. Mixer*, 124 U. S., 721.)

*Damages for wrongful attachment.*

- 2 (U. S. C. C., 1888.) The loss of interest occasioned by an attachment wrongfully laid is clearly an injury for which damages are recoverable against the wrongdoer. (*Jacobus v. Monongahela National Bank of Brownsville*, 35 Fed. Rep., 395.)

## ATTACHMENT—Continued.

## ACTIONS OF ATTACHMENT, PLEADING AND PRACTICE—continued.

*When dividends covered by attachment.*

- 3 (U. S. C. C., 1888). Where shares of corporation stock are attached, the subsequently declared dividends are as much bound by the attachments as the corpus of the stock itself is. (Ib.)

*Counsel fees in defending against wrongful attachment not recoverable as damages.*

- 4 (U. S. C. C., 1888). Counsel fees and other expenses (not taxable as costs) paid or incurred in defending against an attachment wrongfully laid are not recoverable as damages in an action upon a statutory recognizance given when the attachment was issued, conditioned for the payment to the party aggrieved of "such damages as the court may adjudge." (Ib.)

*When creditor can not be enjoined from selling under attachment although he had concealed the property from other creditors so as to prevent their levying upon it.*

- 5 (U. S. Sup. Ct., 1901). One who has actual possession of the goods of a debtor corporation under a bill of sale which, being executed by the president without authority, did not give a good title can not be enjoined from selling said property under an attachment thereon, owing to the fact that he placed the property in the nominal possession of his attorney in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of the other creditors. (Dooley v. Hadden—Hadden v. Dooley, 179 U. S., 646.)

*Practice pleading.*

- 6 (U. S. Sup. Ct., 1901). In Illinois the law does not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure and attachment at the suit of creditors of the vendor; and in cases of this kind the courts of the United States regard and follow the policy of the State law. (Dooley v. Pease, 180 U. S., 126.)
- 7 (U. S. Sup. Ct., 1901). Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review. (Ib.)
- 8 (U. S. Sup. Ct., 1901). Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court if there was any evidence upon which such findings could be made. (Ib.)
- 9 (U. S. Sup. Ct., 1901). Applying the settled law of Illinois to the facts as found, the conclusion reached in this case by the circuit court, and affirmed by the circuit court of appeals, that the sale was void against the attaching creditors, must be accepted by this court. (Ib.)
- 10 (U. S. Sup. Ct., 1901). A receiver of a national bank may be notified, by service upon him of an attachment issued from a State court, of the nature and extent of the interest sought to be acquired by the plaintiff in the attachment in the assets in his custody; but, for reasons stated in Earle v. Pennsylvania, ante, 449, such an attachment can not create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, nor prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming to his hands or realized by him as receiver from the sale of the property and assets of the bank. (Earle v. Conway, 178 U. S. Rep., 456.)
- 11 (Ala., 1896). An appearance, by counsel, of a nonresident attachment defendant, for the sole purpose of moving a discharge of the levy and the dissolution of the attachment, does not constitute a general appearance, and service must be made by publication before default and judgment can be entered. (Exchange National Bank v. Clement (Ala.), 19 So., 814; 109 Ala., 270.)

## ATTACHMENT—Continued.

## ACTIONS OF ATTACHMENT, PLEADING AND PRACTICE—continued.

- 12 (Ala., 1896). In action against a nonresident commenced by attachment, unless the levy is fictitious or merely colorable, the defendant can not, as a ground for abating the action, dissolving the attachment, or vacating the levy, traverse the ownership of the property attached, or deny having a leviable interest therein. (Ib.)
- 13 (N. Y. Sup.). In an action by an attaching creditor against certain plaintiffs in an action to replevy the attached property for the appointment of a receiver, L., who claimed a lien by virtue of an attachment prior to plaintiff's, was not made a party to the action, and after the appointment of the receiver he made a motion to modify the order made therein, so far as it directed the sheriff to deliver to the receiver the property held under his attachment. *Held*, that L. might appeal from an order denying such motion. (National Park Bank v. Goddard, 20 N. Y. S., 499; In re Lillianthal, ib.)
- 14 (N. Y. Sup.). A receiver who simply holds property pending the determination of an action to settle the ownership of the same has no interest in such action and will not be allowed to intervene. (National Park Bank v. Goddard, 20 N. Y. S., 526.)

## GARNISHMENT OF NATIONAL BANKS:

- 1 (U. S. Sup. Ct., 1900). An attachment against a national bank as garnishee is not an attachment against the bank or its property nor a suit against it, within the meaning of United States Revised Statutes, section 5242, prohibiting such suit against such bank in a State court, with a view of acquiring a preference over other creditors, after insolvency or in contemplation thereof. (Earle, Receiver, etc., v. Commonwealth of Pennsylvania, 178 U. S., 449.)
- 2 (U. S. Sup. Ct., 1900). When the Chestnut Street National Bank suspended and went into the hands of a receiver, the entire control and administration of its assets were committed to the receiver and the Comptroller, subject, however, to any rights or priority previously acquired by the plaintiff through the proceedings in the suit against Long. (Ib.)
- 3 (U. S. Sup. Ct., 1900). The State court had no authority to order execution in favor of the plaintiff of any dividends upon the money on deposit in the bank to Long's credit at the time the bank was served with the attachment, and direct the sale of the shares of stock originally held by the bank as collateral security. (Ib.)
- 4 (Kans., 1901). It is the duty of one summoned in garnishment, holding property in the name of, or apparently that of, the defendant debtor, having notice of the claim of a third party to the property, to disclose, by his answer, the name and post-office address of such claimant, the fact that such claim is made, and the nature of such claim so far as known to the garnishee, that such claimant may be interpleaded, and the garnishee may be relieved from liability by delivery of the property to the officers of the court, as provided by statute. (Rock Island Lumber and Mfg. Co. v. Fourth Nat. Bank of Wichita et al., 4 Banking Cases, 380; 63 Kans., 768; 66 Fed. Rep., 1024.)
- 5 (Kans., 1901). When a bank, summoned as garnishee, has on deposit money deposited by the defendant debtor, and has notice of the claim of a third party thereto, and files its answer denying all liability as garnishee, without making disclosure of the facts, and the plaintiff elects to take issue on such answer, if it is disclosed upon the trial that the garnishee had such money on deposit at the time of the service of the summons in garnishment, the garnishee will not be permitted to defend or escape liability upon the ground that some third party is entitled to the property; nor will a judgment of liability to plaintiff in the garnishment proceeding and satisfaction thereof afford the garnishee protection from the demand of a known claimant to the fund. (Ib.)

## ATTACHMENT—Continued.

## GARNISHMENT OF NATIONAL BANKS—continued.

- 6 (Kans., 1901). A judgment against a garnishee and satisfaction thereof will afford the garnishee full protection against all third parties claiming the fund in the hands of the garnishee at the time of the service of summons in garnishment, of whose claim the garnishee had no knowledge, and will also afford protection against all third parties who, knowing the property claimed by them had been arrested in the hands of the garnishee, fail to assert their rights thereto by interpleading in the garnishment proceedings. (Ib.)
- 7 (Mo. Appls., 1903). Where, before the service of the garnishee summons in an action against a depositor in bank and the bank as garnishee, the depositor had given a check for the amount of his deposit, which had been presented to and accepted by the bank, and the amount charged to the depositor and credited to the payee in the check, the relation of debtor and creditor between such depositor and the bank had ceased to exist; hence the bank could not be held as garnishee. (*Young v. Bank of Princeton*, 5 B. C., 366; 71 S. W. Rep., 713.)

*Check, when not affected by garnishment.*

- 8 (Ky., 1899). A check drawn prior to, but presented subsequent to, the service of an attachment upon the bank as garnishee, is, to the amount for which it is drawn, an appropriation of any funds in the bank to the credit of the drawer at its presentation, regardless of the attachment lien. (*Winchester Bank v. Clark County Nat. Bank*, 1 Banking Cases, 515; 51 S. W., 315.)

*When section 5242 not applicable.*

- 9 (Pa., 1899). Section 5242 of the Revised Statutes of the United States, providing in substance that no attachment shall issue against a national bank or its property before final judgment in any proceeding in any State court, etc., is not applicable to an attachment against an individual with a clause of scire facias to warn the bank to show cause why judgment should not be levied on such individual's property in the possession of the bank. (*Commonwealth, to use of Commonwealth Title Insurance and Trust Co. v. Chestnut Street National Bank et al.*, 1 Banking Cases, 748.)

*Funds of a bankrupt estate deposited by bankrupt court can not be garnished.*

- 10 (N. Y., 1875). A national bank holding funds belonging to a bankrupt estate as depository of a bankrupt court can not be garnished in proceedings supplementary to execution. (*Havens v. National City Bank of Brooklyn*, 6 Thompson & Cook, 346; 1 N. B. C., 783.)

*Bank in liquidation may be garnished.*

- 11 (Ala.). A national bank may be garnished after it has gone into liquidation. (*Birmingham N. B. v. Mayor*, 104 Ala., 634.)

*Demand not necessary.*

- 12 (Ala.). A garnishment may be had without first making a demand upon the bank. (Ib.)

*True owner entitled to deposit.*

- 13 (Iowa). The true owner of a deposit is entitled to the deposit as against the depositor's garnishing creditor. (*Des Moines Cotton Mills Co. v. Cooper*, 93 Iowa, 654.)

*Bank must respect lien created by garnishment.*

- 14 (Kans.). The bank must respect the lien from the time it has notice of the garnishment. (*Exchange Bank v. Gulick*, 24 Kans., 359.)

*Transfer good against subsequent garnishment.*

- 15 (Mass.). A transfer of deposits is good against subsequent attachments and garnishments. (*Taft v. Bowker*, 132 Mass., 277.)

## ATTACHMENT—Continued.

## GARNISHMENT OF NATIONAL BANKS—continued.

*Uncollected paper not subject to garnishment.*

16. Uncollected paper is not subject to garnishment.  
(Conn.) *Grosner v. Farmers' Bank*, 13 Conn., 104;  
(Maine) *Bowker v. Hill*, 60 Me., 172;  
(Mass.) *Hancock v. Colyer*, 99 Mass., 187;  
(Pa.) *Allen v. Erie City Bank*, 57 Pa., 129.

## MISCELLANEOUS.

*Attaching creditor acquires no right superior to other creditors.*

- 1 (Tex., 1896). An attaching creditor of an insolvent corporation acquires no right superior to other creditors. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.*, Tex. Civ. App., 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchant's National Bank*, ib.)
- 2 (Tex., 1896). An attaching creditor of an insolvent corporation for which a receiver is appointed after the attachment acquires no preference right or lien that will deprive the court of the power to equitably apportion the earnings of the property during the receivership to claims classed as operating expenses. (Ib.)

*When bank's lien superior to that of attaching creditor.*

- 3 (W. Va., 1895). A bank which discounted a draft to which was attached deliverable to its order, a bill of lading of the goods against which the draft was drawn was not required, on notice of nonacceptance of the draft, to charge the amount thereof against the drawer's account, which was sufficient to pay the draft, in order to enforce its lien on the property against an attaching creditor of the drawer. (*Neill v. Rogers Bros. Produce Co.* (W. Va.), 23 S. E., 702; 41 W. Va., 37.

## BONDS, PURCHASE OF. (See POWERS.)

## BONDS OF OFFICERS. (See OFFICERS.)

## BOOKS, INSPECTION OF.

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## BRANCH BANKS.

*Business of a national bank, where transacted.*

- 1 (U. S. Dist. Ct., 1889). Under Revised Statutes, section 5190, providing that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate," a national bank can not make a valid contract for the cashing of checks upon it at a different place from that of its residence, through the agency of another bank. (*Armstrong v. Second National Bank of Springfield*, 38 Fed. Rep., 883.)
- 2 (N. Y., 1875). A national bank located in another State can not keep an office for discount and deposit in New York, and can not maintain an action upon a note discounted at such office. (*National Bank of Fairhaven v. The Phoenix Warehousing Co.*, 6 Hun., 71; 1 N. B. C., 784.)

## BRANCH BANKS—Continued.

- 3 (N. Y., 1875). In this regard national banks are subject to State laws forbidding foreign corporations to act within the State. (Ib.)

*Business necessarily transacted away from the bank.*

- 4 (U. S. Sup. Ct., 1870). The provision of the national-bank act requiring "the usual business" of the banks to be transacted "at an office or banking house in the place specified in its organization certificate," does not prevent the purchase of coin by one bank at the banking house of another. (Merchants' National Bank v. State National Bank, 10 Wall., 604; 1 N. B. C., 47.)

## BROKER. (See POWERS.)

## CAPITAL STOCK.

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## INCREASE OF CAPITAL STOCK.

*Increased stock must be paid in to make increase valid.*

- 1 (U. S. C. C. A., 1898). The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by directors, with an understanding that they were not to be paid, is in violation of Revised Statutes, section 5142, and the directors of the bank participating are liable for all losses resulting to creditors. (Cockrill v. Abeles et al., 86 Fed. Rep., 505.)
- 2 (U. S. C. C. A., 1898). The provision of Revised Statutes, section 5142, to the effect that no increase of the stock of a national bank shall be valid until the whole amount thereof is paid in, does not create a condition which renders shares subscribed and paid for in full invalid unless the entire amount of the proposed increase is subscribed and paid for in full, but refers only to the actual increase created by a subscription for a given number of shares, which must be paid up in full to render it valid; the amount of the proposed increase approved by the Comptroller merely fixing the maximum amount within which any increase, if paid up, will be valid, and each subscription thereto when paid up in full becomes valid and binding until such maximum is reached. (Scott v. Latimer, 89 Fed. Rep., 843.)

*Subscriptions to invalid increase of capital stock.*

- 3 (U. S. C. C., 1889). National banks have no authority to increase their capital stock except as provided by Revised Statutes, section 5142, and act of Congress, May 1, 1886; and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase and the certificate and approval of the Comptroller of the Currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to

## CAPITAL STOCK—Continued.

## INCREASE OF CAPITAL STOCK—continued.

such increase can not be enforced. (*Winters v. Armstrong*; *Armstrong v. Stange*; *Armstrong v. Wood*, 37 Fed. Rep.. 508.)

- 4 (U. S. C. C., 1889). Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase and on the compliance by the corporation with all the requirements of the statute necessary to make the increase stock valid, and in case of noncompliance with such requirements there is a failure of consideration. (Ib.)
- 5 (U. S. C. C., 1889). In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank, subsequent to defendants' subscriptions, and with their knowledge, represented to the public by means of circulars, letter heads, etc., that its capital stock had been so increased and that defendants allowed their names to remain "upon the list of those subscribing for and entitled to such new or increase of stock," but without alleging that the public gave credit to the bank on the faith that the defendants were part owners of such increase of stock, or that they allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase. (Ib.)
- 6 (U. S. C. C., 1889). A subscriber who has made payments on his subscription to the proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands. (Ib.)
- 7 (Mo., 1888). A national bank determined to increase its capital stock from \$300,000 to \$500,000. The new stock subscriptions amounted only to \$130,060. This was never authorized by vote of the stockholders, nor certified to or approved by the Comptroller of the Currency. The plaintiff subscribed and paid \$2,000 for so much of the originally proposed increase. *Held*, that plaintiff did not become a stockholder, and when the bank became insolvent was entitled to judgment against the receiver for the amount so paid. (*Schierenberg v. Stephens*, 32 Mo. App., 314; 3 N. B. C., 528.)

*When subscriber to increased stock is held as owner.*

- 8 (U. S. Sup. Ct., 1891). Where one subscribes for shares in the increase of the capital of a national banking association in a certain amount, such subscription being paid in full and the entry made on the stock book of the bank, he becomes a shareholder, although no stock certificate is issued. (*Pacific National Bank v. Eaton*, 141 U. S., 227.)
- 9 (U. S. Sup. Ct., 1886). Where a shareholder subscribes to a certain increase of capital stock and pays his subscription and the bank afterwards reduces the amount of the increase, if such subscriber has assented to or ratified the change he will be held a shareholder. (*Delano v. Butler*, 118 U. S., 634.)
- 10 (U. S. Sup. Ct., 1890). When the previous proceedings looking to an increase in the capital stock of a national bank have been regular and all that are requisite, and a stockholder subscribes to his proportionate part of the increase and pays his subscription, the law does not attach to the subscription a condition that it is to be void if the whole increase authorized be not subscribed, although there may be cases in which equity would interfere to protect him in case of a material deficiency. U. S. Rev. Stat. 5142 is not violated by an issue of the exact amount of stock that was paid in; it was intended to prevent what is called "watering of stock." (*Aspinwall v. Butler*, 133 U. S., 595.)
- 11 (U. S. Sup. Ct., 1890). The Comptroller of the Currency has power by law to assent to an increase in the capital stock of a national bank less than that originally voted by the directors, but equal to the



## CAPITAL STOCK—Continued.

## INCREASE OF CAPITAL STOCK—continued.

amount actually subscribed and paid for by the shareholders under that vote. (Ib.)

- 12 (U. S. Sup. Ct., 1891). Where one subscribes for shares in an increase of capital stock of a national bank and pays for the same, without waiting to see whether the whole amount of the increase is taken, he is bound by such subscription and payment, though the amount of the increase is afterwards reduced by the bank and the Comptroller of the Currency. (*Pacific National Bank v. Eaton*, 141 U. S., 227; *Thayer v. Butler*, 141 U. S., 234.)
- 13 (U. S. Sup. Ct., 1890). The conditions imposed by Revised Statutes, section 5142, as to the validity of increase of national-bank capital were intended to secure actual cash payment of subscriptions and to prevent watering of stock, not to invalidate bona fide subscriptions actually made and paid. (*Aspinwall v. Butler*, 133 U. S., 595.)
- 14 (U. S. Supt. Ct.). A stockholder in a national bank who, with knowledge of its insolvent condition and of all material facts, subscribes for increased stock to same amount as his original stock, and amount of proposed increase is afterwards reduced, can not question validity of proceedings for such increase to annul such subscription and payment.
  - (U. S. Sup. Ct., 1886) *Delano v. Butler*, 118 U. S., 644;
  - (U. S. Sup. Ct., 1891) *Pacific Natl. Bank v. Eaton*, 141 U. S., 227;
  - (U. S. Sup. Ct., 1891) *Thayer v. Butler*, 141 U. S., 234;
  - (U. S. Sup. Ct., 1891) *Butler v. Eaton*, 141 U. S., 240.

*Comptroller's approval and certificate essential to increase.*

- 15 (S. C., 1874). There can be no increase of the capital of a national bank until the Comptroller of the Currency approves thereof and issues his certificate, as provided by section 13 of the act of Congress providing for the organization of national banks. (*Charleston v. People's National Bank*, 5 South Carolina, 103; 1 N. B. C., 898.)

*Comptroller's certificate conclusive, collateral attack.*

- 16 (U. S. C. C. A., 1898). The certificate of the Comptroller of the Currency that the capital stock of a bank has been increased to a certain amount is conclusive of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and can not be questioned in any collateral proceeding. (*Columbia National Bank of Tacoma et al. v. Matthews*, 85 Fed. Rep., 934.)
- 17 (U. S. C. C. A., 1899). The action of the Comptroller in issuing a certificate approving an increase of the capital stock of a national bank is not subject to collateral attack, and a suit by a subscriber to such stock against a receiver of the bank, after its insolvency, for the recovery of his subscription, on the ground that such increase was illegal and the Comptroller's certificate void, is such an attack. (*Brown v. Tillinghast*, 93 Fed. Rep., 326.)
- 18 (U. S. C. C. A., 1899). Under a resolution of the stockholders of a national bank proposing to increase the capital stock from \$200,000 to \$500,000, and authorizing the president and cashier whenever \$50,000 should be subscribed and paid to certify the same to the Comptroller, subscriptions to such increase, when paid and approved by the Comptroller in the amount of \$50,000, or any multiple thereof not exceeding \$300,000, were valid and binding on the subscribers. (Ib.)
- 19 (U. S. C. C. A., 1899). Where a subscription to a part of an increase of the capital stock of a national bank has become binding by the terms of the original resolution authorizing the increase, the subscriber is not affected by the subsequent action of the shareholders in limiting the amount of such increase to a part only of that originally authorized, when the increase to the amount so limited has been approved by the Comptroller, and whether or not the action so limiting the increase was legally taken can not render his subscription illegal or revocable. (Ib.)

## CAPITAL STOCK—Continued.

## INCREASE OF CAPITAL STOCK—continued.

- 20 (U. S. C. C. A., 1900). The Comptroller's certificate, authorizing an increase of the capital stock of a national bank, is conclusive of the existence of all the facts necessary to authorize such increase in favor of the public and against the subscribers to such stock. *Bailey v. Tillinghast*, 99 Fed. Rep., 801.)
- 21 (U. S. C. C., 1896). Under the national banking law (Rev. Stat., sec. 5142) and the amendment of May 1, 1886 (24 Stat. L., 18), the action of the Comptroller of the Currency in approving of an increase in the capital of a national bank, and certifying that the amount thereof has been paid in is conclusive, and the validity of the increase can not be assailed in a collateral proceeding such as an action to enforce the liability of the stockholders. (*Latimer v. Bard et al.*, 76 Fed. Rep., 536.)
- 22 (U. S. C. C., 1897). The certificate of the Comptroller of the Currency, approving an increase of the capital stock of a national bank is conclusive of the existence of the facts authorizing such certificate, and a subscriber to the stock can not question its validity. (*Tillinghast v. Bailey et al.*, 86 Fed. Rep., 46.)

*Holder of increased stock when estopped to claim increase illegal.*

- 23 (U. S. C. C. A., 1898). The certificate of the Comptroller of the Currency that the capital stock of a bank has been increased to a certain amount is conclusive of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and can not be questioned in any collateral proceeding. (*Columbia National Bank of Tacoma et al. v. Matthews*, 85 Fed. Rep., 934; 79 Fed. Rep., 558, reversed.)
- 24 (U. S. C. C. A., 1898). One who subscribes to a proposed increase of stock with knowledge that the stockholders had by a resolution authorized the officers, with the approval of the Comptroller, to increase the capital stock in any multiple of \$50,000 up to \$300,000, as the subscriptions shall be paid in, is estopped from questioning the regularity of the proceedings after the certificate of the Comptroller to such an increase is obtained. (*Ib.*)
- 25 (U. S. C. C. A., 1898). A stockholder who, by power of attorney, has authorized another to vote his stock at any and all stockholders' meetings "in the same manner as I should do were I there personally present," is estopped by the vote of his proxy as respects any irregularity in the proceedings or calls of the meeting, which he could have waived if personally present. (*Ib.*)
- 26 (U. S. C. C. A., 1900). By a resolution duly passed, the stockholders of a national bank authorized an increase of \$300,000 in the capital stock, and under such resolution defendants and others subscribed and paid for such stock to the amount of \$150,000, and received certificates therefor, upon which dividends were paid the same as on the original stock. The names of the subscribers were entered on the books of the bank as stockholders, but the increase was not certified to the Comptroller until three years later, the stock being shown during that time in the published statements of the bank as "stock paid in but not certified." At the end of that time a second resolution was passed, reducing the amount of the authorized increase to \$150,000, and directing the same to be certified to the Comptroller, which was done, and the increase was approved by him. The bank was then known to be insolvent, and was thereafter closed, and a receiver appointed. *Held*, that the action of the stockholders in reducing the amount of the increase was legal, and that of the Comptroller in approving the increase under the circumstances was proper; that the subscribers became stockholders, and had no equitable ground upon which to repudiate their liability as such to the creditors of the bank. (*Bailey v. Tillinghast*, 99 Fed. Rep., 801.)
- 27 (U. S. C. C., 1897). Subscribers to a duly authorized and increased issue of stock by a national bank, who accept certificates therefor, vote the stock by proxy, and take dividends thereon, can not question the

## CAPITAL STOCK—Continued.

## INCREASE OF CAPITAL STOCK—continued.

- validity of such stock as against the receiver after the bank has become insolvent. (*Tillinghast v. Bailey et al.*, 86 Fed. Rep., 46.)
- 28 (U. S. C. C., 1896). Where the capital of a national bank has been increased, and defendants have received their additional stock, and for several years held themselves out as stockholders, they can not, when the bank becomes insolvent and they are assessed to pay its indebtedness, deny their liability upon the ground that the increase of capital was fraudulent, and that they could not have discovered the fraud with ordinary care. More diligence was required of them, and they are estopped by their laches. *Upton v. Tribilcock*, 91 U. S., 45, and *Sanger v. Upton*, ib., 64, followed. (*Latimer v. Bard et al.*, 76 Fed. Rep., 536.)
- 29 (U. S. C. C., 1896). The officers, in taking the necessary steps for such increase, act as the agents of the stockholders, and such stockholders can not set up the fraud of the officers concerning the increase to defeat the claims of innocent creditors. (Ib.)
- 30 (U. S. C. C., 1896). Under the United States statutes national banks have the abstract power to increase their capital to such a limit as may be approved by the Comptroller of the Currency, and where stockholders have assented to an increase they can not set up any defects or irregularities in the exercise of the power as a defense in an action to enforce their liability. *Chubb v. Upton*, 95 U. S., 665; *Veeder v. Mudgett*, 95 N. Y., 295, followed. *Scovill v. Thayer*, 105 U. S., 143, and *Implement Co. v. Stevenson*, 13 C. C. A., 661, 66 Fed., 633, distinguished. (Ib.)

## ENFORCEMENT OF PAYMENT OF CAPITAL STOCK.

- 1 (U. S. Rev. Stat., 5141). Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association.
- 2 (U. S. C. C., 1889). National banks have no authority to increase their capital stock except as provided by Rev. Stat. U. S., 5142, and act of Congress May 6, 1886; and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount of such increase, and the certificate and the approval of the Comptroller of the Currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase can not be enforced. (*Winters v. Armstrong*; *Armstrong v. Strange*; *Armstrong v. Wood*, 37 Fed. Rep., 508.)
- 3 (U. S. C. C., 1889). Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase and on the compliance by the corporation with all the requirements of the statutes necessary to make the increase stock valid, and in case of noncompliance with such requirements there is failure of consideration. (Ib.)
- 4 (U. S. C. C., 1889). In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank subsequent to defendants' subscriptions, and

## CAPITAL STOCK—Continued.

## ENFORCEMENT OF PAYMENT OF CAPITAL STOCK—continued.

with their knowledge, represented to the public by means of circulars, letter heads, etc., that its capital stock had been so increased and that defendants allowed their names to remain "upon the list of those subscribing for and entitled to such new or increase of stock," but without alleging that the public gave credit to the bank on the faith that the defendants were part owners of such increase of stock, or that they allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in perfecting such increase. (Ib.)

- 5 (U. S. C. C. A., 1899). The maker of a note given in payment for stock in a national bank and transferred to the bank by the payee with the maker's knowledge and acquiescence, can not defend against an action thereon by the receiver of the bank on the ground of failure of consideration, because of the bank's insolvency, where he has been fully indemnified against loss by the payee. (*Myers v. Hettinger*, 94 Fed. Rep., 370.)

*Receiver may collect note when statute requires payment of stock in cash.*

- 6 (Miss.). A receiver can collect from a stockholder a note given for capital stock, although a statute requires that the capital stock shall be paid in cash. (*Hepburn v. Kincannon*, 74 Miss., 691.)

*Rights of creditors of corporations under general principles of law.*

- 7 (U. S. C. C., 1895). The right of creditors to look to unpaid portions of the capital stock as a fund for the payment of their claims is not created by State statutes, but is derived from general principles of law. The enforcement of such right, therefore, is not dependent upon remedies provided by State legislation; and if it appear that the State has, by statute, provided legal remedies for the enforcement of equitable rights, the creditor may, at his election, when proceeding in a Federal court, adopt the form of remedy appropriate in courts of equity, or may sue at law, under the statute. (*First National Bank of Sioux City v. Peavey*, 69 Fed. Rep., 455.)

- 8 (U. S. C. C., 1895). The question whether the right of a creditor to look to unpaid capital stock is legal or equitable in its nature in any particular case is to be determined, it seems, by the following principles: If a person has subscribed for or purchased the stock under such circumstances that the corporation itself, and through it its creditors, can call upon the stockholder for the unpaid portions of the stock, then this claim is one at law based upon the express or implied terms of the subscription or purchase. If, however, by the terms of the original subscription or purchase, no liability is assumed to make any further payments to the corporation on this stock, and it is agreed between the corporation and the stockholder that the stock shall be considered as full paid, then a creditor's right to look to unpaid portions of the stock is equitable, and can not be enforced by action at law unless so provided by statute. (Ib.)

*Action by one creditor must be for all.*

- 9 (U. S. C. C., 1896). Where suit is brought in equity to enforce subscriptions to the capital stock of a corporation as part of a trust fund for the benefit of the creditors of such corporation, the bill must be so framed as to be for the benefit of all the creditors who are entitled to the trust fund. (*First National Bank of Sioux City v. Peavey*, 75 Fed Rep., 154.)
- 10 (Nev.). Creditors who may choose may come in, establish their claims, and contribute to the expense of the suit to subject the unpaid subscription of a stockholder to the satisfaction of their claims under the equity practice, and under section 1077 of the Nevada Compiled Laws, which provides that when the question is one of common or general interest of many persons, one or more may sue or defend for the benefit of all. (*Thompson v. Reno Savings Bank*, 19 Nevada, 103; 3 Am. St. Rept., 797; see note.)

## CAPITAL STOCK—Continued.

## REDUCTION OF CAPITAL STOCK.

*Comptroller's certificate approving reduction, effect of.*

- 1 (U. S. Dist. Ct., 1900). The certificate of the Comptroller of the Currency issued to a national bank approving a reduction of its capital stock is in itself proof of such reduction. (*Brown v. Ellis*, 103 Fed. Rep., 834.)

*Disposition of proceeds of retired stock.*

- 2 (Col., 1901). A stockholder's resolution reducing the amount of capital stock of a bank one-half and providing that each stockholder should surrender one-half of his stock and receive long-time certificates of deposit therefor could only operate to distribute to the stockholders the excess of the bank's assets over its liabilities and stock as reduced, and hence, where the bank was insolvent at the time the resolution was passed, a holder of such certificates of deposit was not entitled to payment in priority over other creditors. (*Kassler v. Kyle*, 65 Pac. Rep., 34; 28 Col., 374.)
- 3 (Conn., 1905). Under United States Revised Statutes, section 5145 (U. S. Comp. St., 1901, p. 3463), providing that the affairs of a national bank shall be managed by the directors, the directors may, on a reduction of the capital stock of the bank by a vote of the shareholders, approved by the Comptroller of the Currency on the assurance of the president and directors that bad and doubtful assets will be charged off and set aside for the benefit of the then shareholders, charge off the bad and doubtful assets as, in effect, a dividend from assets in excess of capital stock, and on so doing the right to receive the proceeds of the assets thus set apart is irrevocably vested in those who are shareholders on the date of the approval of the reduction of stock by the Comptroller of the Currency. (*Cogswell et al. v. Second National Bank*, 60 Atl. Rep., 1059.)
- 4 (Conn., 1905). Under United States Revised Statutes, sections 5199, 5204 (U. S. Comp. St., 1901, pp. 3494, 3495), authorizing directors of a national bank to declare semiannual dividends out of net profits after carrying one-tenth part of the net profits of the preceding half year to the surplus fund until the same shall amount to 20 per centum of the capital stock and prohibiting the withdrawal, in the form of dividends or otherwise, of any portion of the capital, assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders by the directors, and dividends so ordered may be made payable in the future and on the contingency of future collections on such assets. (Ib.)
- 5 (Conn., 1905). A national bank in charging off assets against capital stock withdrawn by consent of the Comptroller of the Currency may list in the schedule of charged-off assets claims which are also and primarily listed at a lesser valuation as part of the capital stock. (Ib.)
- 6 (Conn., 1905). Where assets of a national bank are charged off against withdrawn capital stock and set apart in trust for the benefit of the then stockholders, a subsequent transfer of shares by the stockholders does not pass the right to the interest of the transferrers in the trust fund, notwithstanding the provision of Revised Statutes of the United States, section 5139 (U. S. Comp. St., 1901, p. 3461), that transferees of national bank stock shall succeed to all the rights and liabilities of their transferrers. (Ib.)
- 7 (Conn., 1905). Similarly, shareholders at the time of the creation of the trust fund may at any time thereafter transfer their rights in the trust fund, with or without a transfer of their shares of stock. (Ib.)
- 8 (Ind., 1887). The capital of a national bank having become impaired by the nonpayment of the interest on some paper among its assets to the amount of \$71,000, in order to avoid an assessment by the Comptroller the stockholders reduced its capital stock and carried the bills

## CAPITAL STOCK—Continued.

## REDUCTION OF CAPITAL STOCK—continued.

and notes to the account of suspended or "bad debts," which were not thereafter included as assets, although retained in its custody. Some years afterwards the bank realized \$75,000 from collaterals pledged for the security of that paper. In a suit by a stockholder to recover his share of the amount realized proportioned to the amount of stock surrendered, *Held*, that he could not recover. (*McCann v. First National Bank of Jeffersonville*, 112 Ind., 354; 3 N. B. C., 434.)

- 9 (N. Y. Common Pleas, 1878). A national bank reducing its capital can not retain, as a surplus or for any other purpose, any portion of the money which it received for retired stock, and having refused to permit shares thus retired to be transferred on its books, is liable for the value of the shares to the holder. (*Seeley v. New York National Exchange Bank*, 78 N. Y., 608; 4 Abb. New Cases, 61; 2 N. B. C., 340.)

## RESTORATION OF IMPAIRED CAPITAL.

*Assessments under Revised Statutes, section 5205.*

- 1 (U. S. C. C., 1898). On notice from the Comptroller, under Revised Statutes, section 5205, that the bank's capital is impaired so as to require an assessment on the stockholders, such assessment is to be made by the stockholders themselves and an assessment by the directors is void. (*Hulitt v. Bell et al.*, 85 Fed. Rep., 98.)
- 2 (U. S. C. C., 1898). An assessment to restore impaired capital, under Revised Statutes, section 5205, is only enforceable by subjecting the stock of persons refusing to pay, and no action will lie against the stockholders personally. (Ib.)
- 3 (Ga., 1898). A sale of all the shares of stock held by a shareholder in a national bank, when such sale is made under the provisions of and for the purpose set forth in section 5205, Revised Statutes United States, as amended by act June 30, 1876, is void, unless at such sale the stock brings a price equal in amount to the assessment placed thereon under the provisions of that section. (*Merchants' National Bank of Rome v. Fouche*, 1 Banking Cases, 745; 103 Ga., 851.)

*When stockholders may sue the bank for improper assessment.*

- 4 (N. Y.). Where a bank sold a stockholder's shares for his failure to pay assessments made necessary by the losses caused by the negligence of the directors, an action to recover the losses so sustained, which would ordinarily be brought against the delinquent directors by the corporation, need not be brought by it, but may be brought by the stockholders affected, when the managing directors at the time are the ones charged with the misconduct. (*Hanna v. People's Nat. Bank*, 71 N. Y. S., 1076; 35 Misc. Rep., 517.)

*Equities of shareholders who pay improper assessment.*

- 5 (U. S. C. C., 1899). Where a number of the shareholders of a national bank in good faith paid an assessment made to comply with a requirement of the Comptroller to make good an impairment of the bank's capital, although such assessment was invalid because made by the directors instead of by the stockholders, on the insolvency of the bank and the winding up of its affairs by a receiver, after outside creditors are paid such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders and repaid the amounts so paid before general distribution of the remaining assets among all the shareholders. (In re *Hulitt*, 96 Fed. Rep., 785.)

*Voluntary assessments to restore impaired capital do not discharge shareholders from liability.*

- 6 (U. S. Sup. Ct., 1886). Where shareholders have assessed themselves to the amount of the par value of the stock for the purpose of restoring impaired capital, the contributions made in pursuance of such assessment, though all used in paying the debts of the association, will not so operate as to discharge the shareholders from their individual liability. (*Delano v. Butler*, 118 U. S., 634.)

## CAPITAL STOCK—Continued.

## RESTORATION OF IMPAIRED CAPITAL—continued.

- 7 (U. S. C. C., 1885). A voluntary assessment of one hundred per cent under section 5205 for the purpose of restoring impaired capital will not relieve shareholders of their individual liability under section 5151. (*Morrison v. Price*, Receiver, 23 Fed. Rep., 217.)
- 8 (U. S. C. C., 1889). In an action by the receiver of an insolvent national bank to recover of a stockholder an assessment on his shares, the defendant alleged as a counterclaim that the Comptroller of the Currency had directed the bank to restore the value of certain securities held by it which had been reported worthless by an examiner; that certain of the stockholders, including defendant, had raised a fund which was placed in the hands of trustees to apply so much as might be from time to time required by the Comptroller to retire such securities; that the fund was deposited with the bank with full notice of the purpose to which it was to be applied; that a portion had been used to retire the securities designated, and that when the bank failed the balance of the fund came into the hands of the receiver, and was now claimed by him as a part of the ordinary assets of the bank; that a certain portion of this balance belonged to defendant, which amount he asked to set off against plaintiff's demand. *Held*, that a general demurrer based on the ground that no set-off or counterclaim was available in such an action would be overruled, as the claim could be set off if it was of such a nature that the holder would be entitled to receive the full amount before distribution by the receiver to general creditors. (*Welles v. Stout*, 38 Fed. Rep., 807.)
- 9 (U. S. C. C., 1895). The F. National Bank suspended business for lack of funds, and was placed in charge of a bank examiner, who required that \$50,000 should be raised and placed in the bank before it could resume business. The stockholders, including one B., the president, thereupon raised this sum, in amounts equal to 50 per cent of their stock, and placed it in the bank. The examiner caused entries to be made on the books indicating that this contribution was a voluntary assessment, subject, after one year, to the liabilities of the bank, and permitted the bank to resume. B., at a meeting of the directors subsequently held, protested against these book entries, but afterwards signed reports in which the \$50,000 was included as surplus. At the time of the advance the bank held two notes of B., and discounted another note of his a few days before the expiration of a year from the advance. Shortly after the expiration of the year the bank again suspended payment. *Held*, that the advance to the bank was a voluntary assessment and not a loan, and could not be set off by B. in an action against him on the notes by the receiver of the bank. (*Broderrick v. Brown*, 69 Fed. Rep., 497.)

*Directors have no authority to levy assessment to restore capital; shareholders alone can act.*

- 10 (U. S. Sup. Ct., 1904). Section 5205, Revised Statutes, is intended to, and does, confer upon a national banking association the privilege of declining to make the assessment to make good a deficiency in the capital after notice by the Comptroller of the Currency so to do and to elect instead to wind up the bank under section 5220. The shareholders and not the directors have the right to decide which course shall be pursued, and an assessment made upon the shares by the directors without action by stockholders is void. (*Commercial National Bank v. Weinhard*; same *v. Williams*, 192 U. S., 243.)

## SALE OF CAPITAL STOCK.

*Acquirement of its own stock by a national bank.*

- 1 (N. Y. Appls., 1867). A national bank can acquire an interest in its own stock only by purchase to prevent a loss upon a debt previously contracted in good faith; and a provision in certificates of stock in such bank that they shall not be transferred until all the liabilities of the

## CAPITAL STOCK—Continued.

## SALE OF CAPITAL STOCK—continued.

stockholder to the bank are paid is void and of no effect. (*Conklin v. The Second National Bank*, 45 N. Y., 655; 1 N. B. C., 693.)

*A national bank may not purchase its own stock.*

- 2 (U. S. C. C. A., 1898). The purchase of its own stock by a national bank, not for the purpose of preventing, or necessary to prevent, a loss upon a debt previously contracted, is illegal, and the bank may maintain an action at law to recover the money paid therefor without tendering back the stock. (*Burrows v. Niblack*, 84 Fed. Rep., 111.)

*Sales of stock under section 5201, Revised Statutes United States, must be real.*

- 3 (U. S. C. C., 1885). The sale which section 5201, Revised Statutes, requires a national bank to make of its own stock is real and not fictitious. And where the president and cashier of a national bank which is the owner of some of its own stock purchase such stock and execute their note to the bank for the purchase money, in a suit against them on the note by the receiver of such bank they are estopped to set up as a defense that their purchase of the stock was unauthorized, or that their purchase was merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose. (*Bundy, as Receiver, etc., v. Jackson*, 24 Fed. Rep., 628.)

*Directors can give president and cashier parole authority to sell.*

- 4 (Ky. Appls., 1903). Where a depositor sued the receiver of a bank for the amount of a deposit, and he pleaded that a part of the deposit was used to pay the depositor's subscription to the capital stock of the bank, evidence that the president and cashier, who made the alleged sale to the depositor, had been given parole authority by the board of directors to sell the stock was admissible. (*Somerset Natl. Banking Co.'s Receiver et al. v. Adams*, 5 B. C., 481; 72 S. W. Rep., 1125.)

*Invalidity of provisions against transfer of stock.*

5. The articles of association and the by-laws of a national bank prohibited the transfer of stock owned by any stockholder indebted to the bank until such indebtedness should be satisfied. *Held*, that the prohibition was invalid, under the national banking act, and that the bank could not thus acquire a lien on the shares of the stockholders.

(U. S. Sup. Ct., 1873) *Bullard v. National Eagle Bank*, 18 Wall., 589; 1 N. B. C., 93;

(N. Y.) *Conklin v. Second National Bank*, 45 N. Y., 655.

- 6 (N. Y., 1900). A by-law of a national bank organized under the act of 1864 seeking to impose restrictions upon transfers of stock by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank is inoperative to accomplish such purpose, being inconsistent with section 36 of such act, which provides that "no association shall make any loan or discount on the security of its own shares of capital stock, nor be purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith." (*Buffalo German Ins. Co. v. Third Nat. Bank of Buffalo*, 2 Banking Cases, 325; 162 N. Y., 163. Affirmed by U. S. Sup. Ct., *Third National Bank of Buffalo v. Buffalo German Insurance Co.*, 193 U. S., 581.)

- 7 (N. Y., 1900). Under such section a national bank is not entitled, by virtue of such a by-law and of notice thereof printed on its certificates of stock, to have an equitable lien upon its outstanding stock declared in its favor against a bona fide purchaser. (Ib.)

*Purchaser of stock may rescind for fraud.*

- 8 (U. S. C. C. A., 1893). The intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further. 50 Fed. Rep., 77; 2 C. C. A., 629; 2 U. S. App., 434, reaffirmed. (*Merrill v. Florida Land and Imp. Co.*, 60 Fed. Rep., 17.)



## CAPITAL STOCK—Continued.

## SALE OF CAPITAL STOCK—continued.

- 9 (U. S. C. C. A., 1893). The receipt by a bank of the fraudulent proceeds of a sale of stock belonging to it, and the subsequent appointment of a receiver, gives its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. (Ib.)
- 10 (S. Dak., 1895). Under Compiled Laws, sections 3589, 4515, relating to the rescission of contracts procured through fraud, one induced to purchase bank stock by fraudulent representations as to its value may rescind the purchase and recover his notes given therefor against a holder of the notes having notice of the fraud. (*Taylor v. National Bank* (S. D.), 62 N. W., 99; 6 S. Dak., 511.)

*Fraud of president in sale of bank stock, defenses.*

- 11 (S. Dak., 1894). S., the president and active manager of a bank, sold a number of shares of its capital stock to T., under representations of fact relied upon by T. and afterwards claimed by him to be fraudulent and false. The bank, by its directors, had full and actual knowledge of such representations, and with such knowledge consented and arranged that T.'s notes given in partial payment for said stock should be made directly to the bank and take the place of notes held by it against S. and others. *Held*, that in an action by the bank against T. on such notes he might make the same defense, founded on such alleged false and fraudulent representations, as he could have made if the notes had been given to S. and the action brought by him. (*National Bank of Dakota v. Taylor*, 58 N. W., 297; 5 S. Dak., 99.)
- 12 (S. Dak., 1894). In such purchase of stock T. had the right to rely solely upon the representations of fact by S., and if S., conscious that T. was so relying, knowingly deceived him, nothing would condone the wrong as between them, or estop T. from asserting it, but his acquiescence in it with knowledge of the facts. (Ib.)
- 13 (S. Dak., 1894). A party who thus deliberately deceives another to his prejudice can not complain that the sufferer has not been vigilant in finding it out. (Ib.)
- 14 (S. Dak., 1894). The right of such sufferer to rescind may be qualified by intervening interests of innocent parties, but so long as the question is between the original parties solely he may continue to rely on the representations upon which the contract was made and by which it was induced, and loses no rights as against the wrongdoer himself by failure to diligently discover the fraud. (Ib.)
- 15 (S. Dak., 1894). The fact that soon after such purchase T. became, and for a number of months was, the cashier of the bank would not alone, and as a matter of law, make him chargeable with a knowledge of the condition of the bank, and so of the falsity of the representations under which he bought, as against evidence that he was for a considerable portion of the time absent from the bank and the city where it was located, and that during all his connection with the bank he, by direction of S., the president, and the person of whom he bought the stock, was engaged in routine work and had practically nothing to do with the bills receivable of the bank. (Ib.)
- 16 (S. Dak., 1894). The fact that as cashier he signed statements exhibiting the condition of the bank would not, in an action on such notes by the bank or by S., estop him from showing, as against them, that such statements, which he believed at the time were true, were in fact false. (Ib.)

*Sale of stock on execution.*

- 17 (Pa., 1895). The State legislature may authorize the sale under execution of national-bank stock. (In re Braden's Estate, 30 A., 746; 165 Pa. St., 184; Appeal of Wood, ib.)

## CAPITAL STOCK—Continued.

## SALE OF CAPITAL STOCK—continued.

*Measure of damages for conversion of stock.*

- 18 (Ala.). The measure of damages for the conversion of stock in a national bank is the highest market value, together with dividends shown to have been paid on the stock. (*Terry v. Birmingham Nat. Bank*, 93 Ala., 599.)

*A national bank may sell stock for a customer.*

- 19 (N. Y.). It is within the incidental powers of a national bank, as part of the regular banking business, to sell the shares of a customer in such bank in order to increase his deposit. (*Williamson v. Mason*, 12 Hun., N. Y., 97.)

*When pledgor can not maintain suit to redeem.*

- 20 (U. S. Sup. Ct., 1877). The pledgor of stock can not maintain an action to redeem and for an accounting after the lapse of over three years, and when the stock has been sold on due notice to the pledgor and an account has been made to him and he has not objected. (*Hayward v. Elliot Nat. Bank*, 2 N. B. C., 1; 96 U. S., 611.)

*Sale of bank stock—Failure to disclose insolvency of bank.*

- 21 (Ky. Appls., 1902). The seller of bank stock is not liable to the buyer in an action of deceit merely because he failed to disclose the insolvent condition of the bank, where he had no connection with the bank, and no actual knowledge of its condition. (*Kirtley's Admr. v. Shinkle*, 5 B. C., 287; 69 S. W. Rep., 723.)

*Measure of damages for deceit in sale of stock.*

- 22 (U. S. C. C. A., 1902). The measure of damages recoverable in an action for deceit inducing the purchase of shares of stock in a corporation is the difference between the price paid and the real intrinsic value of such shares at the time of their purchase, and such value is to be ascertained in the light of subsequent events in the history of the company, and not by their market value, although the plaintiff is not entitled to recover for depreciation by reason of subsequent acts which were entirely independent of the causes existing at the time of the purchase. (*Hindman v. First Nat. Bank of Louisville et al.*, 112 Fed. Rep., 931.)

## LIEN OF BANK ON STOCK OR DIVIDENDS.

*On its own stock.*

- 1 (U. S. Sup. Ct., 1873). A bank can not acquire a lien on its own stock held by its debtors, even if its by-laws are framed with that intention. (*Bullard v. Natl. Eagle Bank*, 18 Wall., 589.)
- 2 (U. S. Sup. Ct., 1870). Loans by bank to stockholder do not give lien to bank on his stock. (*First National Bank of South Bend v. Lanier* (78 U. S.), 11 Wall., 369.)
- 3 (U. S. C. C., 1871). The by-laws of a national bank provided that no transfer of the stock should be made by any shareholder who was indebted to the bank, and this provision was also included in the certificates of stock. *Held*, invalid, and that a transfer of stock by a shareholder while indebted to the bank was good. (*Evansville National Bank v. Metropolitan National Bank*, 2 Bissell, 527; 1 N. B. C., 189.)

NOTE.—This case was appealed to the Supreme Court and affirmed by a divided court, no opinion being given.

- 4 (N. J., 1884). A national bank organized under the law of 1864 can not, even by specific provisions for the purpose in its articles of association and in its by-laws, acquire a lien on its own stock held by its debtor. (*Delaware, Lackawanna and Western Railroad Company v. Oxford Iron Company*, 38 N. J. Eq., 340; 3 N. B. C., 582.)
- 5 (N. Y., 1867). A national bank can acquire an interest in its own stock only by a purchase to prevent a loss upon a debt previously contracted

## CAPITAL STOCK—Continued.

## LIEN OF BANK ON STOCK OR DIVIDENDS—continued.

in good faith, and a provision in certificate of stock in such bank that they shall not be transferred until all the liabilities of the stockholder to the bank are paid is void and of no effect. (*Conklin v. The Second Nat. Bank*, 1 N. B. C., 693; 45 N. Y., 655.)

*Contra.*

- 6 (Maine, 1897). A national bank may, by a by-law, make the shares of a stockholder subject to a lien for his debt to the bank, and thus prevent a transfer on the books until the debt is paid. (*Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me., 500.)
- 7 (Maine, 1897). Where there is no provision in the law of the bank subjecting shares to the payment of a shareholder's debts, a transferee of shares transferable only on the books of the bank by the shareholder or his attorney and by a surrender of the certificate takes a perfect title by transferring the shares under a power to himself, and can require the bank, upon surrender of the certificate, to give a new one, certifying that the shares stand recorded in his own name. (*Bath Saving Institution v. Sagadahoc National Bank*, Me., 36 A., 996; 89 Me., 500.)
- 8 (Maine, 1897). Without the surrender of the certificate of stock, a bank can not issue another upon a transfer made by the apparent owner, either in person or by attorney, that will deprive the real owner of his shares. (*Ib.*)

*Lien of bank on dividends for claim against shareholder.*

- 9 (Maine, 1874). A national bank has a lien on and the right to hold a cash dividend as pledge for the indebtedness of the shareholder to the bank. (*Hagar v. Union Nat. Bank*, 63 Maine, 509; 1 N. B. C., 523.)
- 10 (Ohio). Where the by-laws of a bank authorize its directors to withhold dividends from a stockholder who is indebted to the bank until such indebtedness is paid, and the directors have ordered the dividends of a stockholder to be withheld, a mere donee of such dividends, to whom they were transferred without consideration by such stockholder, can not recover them from the bank until such indebtedness is paid, since such transferee had no better claim to such dividends against the bank than did the transferrer. (*Bellevue Bank v. Higbee*, 2 O. C. D., 512.)

*Necessity of demand before suit for.*

- 11 (Maine, 1874). A national bank sued a shareholder therein and attached his shares. Pending suit he demanded payment of the dividends declared upon the attached shares, which was refused. He afterwards settled the suit and brought an action for his dividends, without renewing his demand. *Held*, that the demand while the shares were attached was a nullity, and as dividends were not payable until demanded, the action could not be maintained. (*Hagar v. Union Nat. Bank*, 63 Maine, 509; 1 N. B. C., 523.)

## MISCELLANEOUS.

*Rights of national bank as to pledged stock.*

- 1 (U. S. Sup. Ct., 1882). Where a national bank made a loan upon the pledge of its own shares and afterwards sold the shares to obtain payment of the loan, which exceeded the amount realized from the shares. *Held*, that the owner of the shares could not, on the ground that the statute forbids a national bank to take its own shares as security, recover from the bank the amount realized upon the sale of the shares. (*First National Bank of Xenia v. Stewart*, 107 U. S., 676; 3 N. B. C., 96.)
- 2 (U. S. Sup. Ct., 1885). But if said stock was merely in the possession of the bank and not deposited with it as collateral for a loan, the bank can not without judicial process and against the debtor's will sell the property and apply its proceeds to the payment of his debt. (*First National Bank of Xenia v. Stewart*, 114 U. S., 224.)

## CAPITAL STOCK—Continued.

## MISCELLANEOUS—continued.

*The character of a stock certificate may be shown aliunde.*

- 3 (U. S. C. C. A., 1898). A certificate of stock in a national bank, though in due form, may be shown aliunde to have been issued to the apparent stockholder solely as collateral security for money loaned. — (Williams v. American National Bank of Arkansas City, Kans., et al., 85 Fed. Rep., 376.)
- 4 (U. S. C. C. A., 1898). It is no defense to an action against a national bank for money had and received that the collateral security it gave to plaintiff was issued without authority of law. (Ib.)

*Pledge of spurious stock by cashier—Liability of bank.*

- 5 (N. C. Sup., 1903). Where the president of a bank, the stock of which had been fully issued, signed blank certificates of the bank's stock, which were left in the custody of the bank's cashier, and such cashier fraudulently filled up and countersigned one of such certificates to himself, which he pledged to plaintiff as security for a loan, and plaintiff had no knowledge that the certificate was spurious, on the cashier's failure to pay the loan the bank was liable to plaintiff for the value of the stock. (Havens v. Bank of Tarboro et al., 5 B. C., 491; 43 S. E. Rep., 639.)

*Insufficient defense in action for stock subscription.*

- 6 (S. Dak., 1899). The president of a bank in issuing shares of its stock for a negotiable note payable to the bank made an agreement with the maker that he should not be called upon to pay the note. *Held*, that the president had no authority to make such agreement, and that in an action on the note against the maker, by its bona fide purchaser from the bank, a verdict was properly directed for plaintiff. (Mead v. Pettigrew, 1 Banking Cases, 595; 11 S. Dak., 529.)

*Diversion of funds paid on subscription.*

- 7 (Wyo.). A subscriber to bank stock can maintain an action against the bank for a diversion of funds delivered by him to the bank to be paid on his stock subscription. (Wilson v. Cheyenne First Nat. Bank, 1 Wyo., 108.)

CASHIER. (See OFFICERS.)

CERTIFICATE OF DEPOSIT. (See DEPOSITS.)

CERTIFICATION OF CHECKS. (See CHECKS.)

## CHECKS.

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## NATURE AND EFFECT OF CHECK.

*Is a check a bill of exchange?*

- 1 (U. S. Sup. Ct., 1870). Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Without acceptance no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such a case would be a fraud. All the authorities, both English and American, agree that a check may be accepted, though acceptance is not usual. By the law merchant of this country the certificate of the bank

## CHECKS—Continued.

## NATURE AND EFFECT OF CHECK—continued.

that a check is good is equivalent to acceptance. It implies that the check was drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. (*Merchants' National Bank v. State National Bank*, U. S. Sup. Ct., 10 Wall., 604.)

2. A check drawn on a bank and payable at some future day is not an inland bill of exchange.  
(Pa.) *Champion v. Gordon*, 70 Pa., 474;  
(R. I.) *Westminster Bank v. Wheaton*, 4 R. I., 30.
3. A check payable after date is a bill of exchange.  
(Cal.) *Mintuan v. Fisher*, 4 Cal., 35;  
(Ind.) *Glenn v. Noble*, 1 Blackf., 104;  
(N. Y.) *Bowen v. Newell*, 13 N. Y., 290;  
(Ohio) *Andrew v. Blachly*, 11 Ohio St., 89.
- 4 (Cal., 1901). Under Civil Code, section 3254, defining a check as "a bill of exchange drawn upon a bank or banker, and payable on demand without interest," an instrument having these characteristics does not cease to be a check because drawn by a bank. (*Garthwaite et al. v. Bank of Tulare*, 4 Banking Cases, 8; 134 Cal., 237.)
- 5 (Cal., 1901). Where a check was sent by mail and never received by the addressee it remained the property of the sender. (Ib.)
- 6 (Ill.). A check is, substantially, an inland bill of exchange, and the rules applicable to such bills are alike applicable to checks. (*Bickford v. First National Bank of Chicago*, 42 Ill., 238.)
- 7 (Ill.). The check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred by delivery, and when presented at the bank the banker becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the drawer has funds to that amount on deposit subject to his check at the time it is presented. These checks are received and passed and deposited with bankers as cash, subject, of course, to be made good if not paid on presentation. This is the legal effect of an ordinary uncertified check. (Ib.)
- 8 (Kans. Sup., 1903). A bank check is a bill of exchange, within the meaning of section 9 of chapter 4 of the General Statutes of 1901, providing that an acceptance of a bill of exchange written on paper other than the bill "shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, in faith thereof, shall have received the bill for a valuable consideration." (*Eakin v. Citizens' State Bank of Ness City*, 5 B. C., 654; 72 Pac. Rep., 874.)
- 9 (N. Y.). In the case of a deposit of a check drawn upon itself, the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank. (*Oddie et al. v. The National City Bank of New York*, 45 N. Y., 735.)
- 10 (Nebr., 1898). A general agent of an insurance company collected money for the company and deposited it to his credit as "general agent," and made remittances from time to time to the company. *Held*, that a check on said fund given by him without direction or authority of the company was a personal and not a company check. (*Penn. Mut. Life Ins. Co. v. Conoughy*, 74 N. W., 422; 54 Nebr., 123.)

## CHECKS—Continued.

## CHECKS REVOKED BY DEATH.

1. All unaccepted checks are revoked by death of the drawer.  
 (Ala.) National Commercial Bank *v.* Miller, 77 Ala., 168;  
 (Ky., 1901) Weiland, admr., *v.* State National Bank of Maysville,  
 65 S. W. Rep., 617;  
 (Mich.) Second National Bank *v.* Williams, 13 Mich., 282;  
 (Ohio) Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St., 457.
- 2 (Cal. Sup., 1902). Where one, for the purpose of making a gift, draws and delivers a check, and asks the payee not to present it till after the donor's death, such death revokes the gift under Civil Code, section 1147, providing that a verbal gift is invalid unless accompanied by a delivery of the thing given, or the means of obtaining its possession and control. (Pullen et al. *v.* Placer Co. Bank, 5 B. C., 216; 71 Pac. Rep., 83.)

*Liability of bank.*

- 3 (Cal. Sup., 1902). A bank paying a check with notice of the drawer's death is liable to his estate. (Ib.)

## ORDER OF PAYMENT.

1. As between different check holders, the one first presenting his check for payment at the bank on which it is drawn is entitled to priority.  
 (Ill.) National Safe and Lock Co. *v.* People, 50 Ill. App., 336;  
 (Ill.) Jacobson *v.* Bank of Commerce, 66 Ill. App., 470;  
 (Ky.) Chambers *v.* Northern Bank of Kentucky, 5 Ky. Law Rep., 123.
- 2 (N. Y.). Mere priority in the drawing of a check does not give it any priority or preference over checks subsequently drawn, as when checks are presented at the same time for more than is due the depositor it would be impossible for banks to do business if they were obliged, at their peril, to settle the conflicting claims of the holders of checks as to rights of priority arising from the time of drawing such checks. (Dykens *v.* Leather Manufacturers' Bank, 11 Paige, 612.)

## PRESENTATION OF CHECK.

*Diligence in presentment.*

- 1 (Idaho Sup., 1902). Under the statutes of Idaho the holder of a check or other bill of exchange payable at sight, without interest, is entitled to ten days in addition to a reasonable time in which to present same for payment before neglect in presenting can be charged against the said holder. (Chambers *v.* Custer Co., 5 B. C., 233; 71 Pac. Rep., 113.)

*Negligence in presentation of check—Discharge of indorser.*

- 2 (Ill. Sup., 1903). Where a property owner delivered two checks of a third person to his building contractors, to be applied on the contract price, and they indorsed the checks to subcontractors, who failed to present the same for payment on the same or the succeeding day on which they were received, during which the maker had sufficient funds in the bank on which the checks were drawn to pay the same, but, by reason of the maker's assignment for the benefit of creditors before the checks were presented, the bank refused to pay the same, the property owner was discharged from liability as indorser of the checks, which constituted a valid payment on the contract. (Brown et ux. *v.* Schintz et al., 5 B. C., 635; 67 N. E. Rep., 172.)

## DATE OF CHECK.

- 1 (N. Y.). The issuing of a check with a blank date is implied authority to any holder to fill in a date. (Crawford *v.* West Side Bank, 100 N. Y., 50.)

## CHECKS—Continued.

## DATE OF CHECK—continued.

- 2 (N. Y.). But where the date of the check was altered by the depositor's bookkeeper, who collected it before the date which it originally bore, the bank and not the depositor must suffer the loss. (Ib.)-
- 3 (N. Y.). When a bank pays a post-dated check before the day upon which it is dated the bank makes the payment upon its own responsibility and can not charge the amount to the drawer. (*Godin v. Commonwealth Bank*, 13 N. Y. Super. Ct., 76.)
- 4 (N. Y.). Parties taking a post-dated check can not recover unless the bank has funds on hand belonging to the drawer at the date of the check, even though the check had been certified by the cashier of the bank on which it was drawn. (*Clarke National Bank v. Albion Bank*, 52 Barb., 592.)

## WHEN PAYMENT CAN NOT BE RESCINDED.

- 1 (Mo.). Where the bank pays a check to the holder, who has taken it in good faith and for value, and charges up the check to the makers, such payment can not be rescinded by the maker without the consent of the person to whom payment was made. (*Albers v. Commercial Bank*, 85 Mo., 173.)

## PAYMENT OF CHECKS NOT PROPERLY COUNTERSIGNED.

- 1 (Mich.). In an action by a bank for overdrafts paid on defendants' check, where it appeared that plaintiff was instructed by defendants to cash no checks not countersigned by their bookkeeper, and that the checks in question were not so countersigned, the burden is on the bank to show that the defendants received the benefit of the amount so drawn. (*Gladstone Exchange National Bank v. Keating*, 94 Mich., 429.)

*Paying unsigned checks.*

- 2 (Mo. Appls., 1902). Where the bookkeeper of a depositing corporation presents an unsigned check, which the bank pays, the bookkeeper appropriating the proceeds, such payment is negligence per se, and the bank is liable to the depositing corporation, without reference to any question of the estoppel of the corporation to recover for the payment of forged checks, because of having failed to warn the bank in advance thereof. (*Kenneth Inv. Co. v. National Bank of the Republic of St. Louis*, 5 B. C., 13; 70 S. W. Rep., 173.)

## PAYMENT OF CHECKS ON TRUST FUNDS.

- 1 (U. S. Sup. Ct., 1881). A bank is held to have notice when an account is kept with a depositor as trustee that the fund is not his individual property if it is shown to consist in whole or part of trust funds. (*National Bank v. Insurance Co.*, 104 U. S., 54.)
- 2 (U. S. Sup. Ct., 1890). Where money is deposited by one known to be an agent the bank has notice that the money belongs to some one other than the depositor. (*Union Stockyards Bank v. Gillespie*, 137 U. S., 411.)
- 3 (Kansas Sup., 1903). A bank can not be held to account to the owner of a fund, where such fund has been deposited by an agent in his own name and paid out upon his check, without knowledge by the bank of any want of power on the part of the agent. (*Martin v. Kansas Natl. Bank et al.*, 5 B. C., 768; 72 Pac. Rep., 218.)
- 4 (Ky. Appls., 1903). If a depositor of trust funds appropriates them to the payment of his individual debt to the bank, the latter, having notice of the character of the fund, is affected with knowledge of the misappropriation and may be compelled to refund. (*Columbia Finance and Trust Co. v. First Natl. Bank*, 5 B. C., 611; 76 S. W. Rep., 156.)



## CHECKS—Continued.

## PAYMENT OF CHECKS ON TRUST FUNDS—continued.

- 5 (Md.). Where a bank has notice of a trust it is liable for funds paid out in known violation of the trust. (*Swift v. Williams*, 68 Md., 236.)
- 6 (Mass., 1869). Where money is so deposited by a trustee that the bank has no notice of the trust the bank is not liable for paying it out as if it belonged to the depositor. (*School Dist. of Greenfield v. First National Bank*, 102 Mass., 174.)

## PAYMENT OF CHECKS ON PARTNERSHIP FUNDS.

- 1 (U. S. C. C.). A bank is liable for paying out partnership funds on the private check of one of the partners, unless it can be shown that the money actually went for partnership purposes. (*Coote v. U. S. Bank*, 3 Cranch., C. C., 50.)

*Deposits to joint credit—Checks—Signatures.*

- 2 (Ky. Appls., 1903). Where several persons make a deposit in a bank to their joint credit, the bank must have the signatures of all appended to a check before it is authorized to pay it. (*Columbia Finance and Trust Co. v. First Natl. Bank*, 5 B. C., 611; 76 S. W. Rep., 156.)

*Payment of one partner's indebtedness from firm's deposit.*

- 3 (Ky. Appls., 1903). Where moneys belonging to a firm are deposited in a bank, a member thereof can not employ any part of such funds to pay his debts to the bank without the consent of the remainder of the firm. (Ib.)

## PAYMENT OF CHECKS DRAWN BY AGENTS WITHOUT AUTHORITY.

- 1 (U. S. C. C. A., 1902). Where a dealer in corn arranged with a bank to cash the checks of his purchasing agent, such checks to be sent to the dealer from time to time with drafts for the amount thereof, and such agent drew and had cashed at such bank checks purporting to but in fact not representing any purchase of corn, and indorsed by himself, and bearing the fictitious indorsement of the pretended payee, if the indorsement by such agent was irregular it was the duty of such dealer, on the first of such checks being sent to him by the bank, to have notified the bank of such fact, and until so notified the bank was not negligent in receiving and paying such checks. (*Armour v. Greene County State Bank*, 112 Fed. Rep., 631; 4 Banking Cases, 233.)
- 2 (U. S. C. C. A., 1902). Where a dealer in corn arranged with a bank to cash the checks of his agent given for the purchase of corn, and each check bore a memorandum of the amount purchased, the truthfulness of the memoranda could at any time have been tested by such dealer by inspecting the corn in the cribs, but it was no part of the duty of the bank, and it could not be held responsible if some of the checks so drawn and cashed by it did not represent actual purchases. (Ib.)
- 3 (U. S. C. C. A., 1902). Where a dealer in corn made an arrangement with a bank to cash the checks of his agent given for the purchase of corn, the bank to be repaid the amount so advanced from time to time on drafts on the dealer, and at the time of making such arrangement he deposited a small sum in the nature of indemnity against its advancements, such deposit did not create the relationship of banker and depositor between them. (Ib.)
- 4 (Ill., 1901). Where a dealer in corn arranges with a bank to cash the checks of his agent given for the purchase of corn, and such agent issues checks purporting to but in fact not representing such purchase, and the bank in good faith cashes such checks, and there is no negligence on the part of such banker, the loss must fall on the dealer, who, by his selection of such agent, made the loss possible. (*Hanna et al. v. Drovers' National Bank*, 62 N. E., 556.)

## CHECKS—Continued.

## PAYMENT OF CHECKS DRAWN BY AGENTS WITHOUT AUTHORITY—continued.

- 5 (Ill.). A depositor gave his clerk a power of attorney to draw checks for fifteen days and deposited the power of attorney at the bank. Without the knowledge of the depositor the clerk drew checks after the fifteen days had expired and appropriated part of the money to his own use. *Held*, that the bank was not entitled to presume that the clerk had a general authority to draw checks beyond the fifteen days, from the fact that when the depositor's bank book was written up it was delivered to the clerk with the paid checks, the depositor not having examined the same and not knowing the facts. (*Manufacturer's National Bank v. Barnes*, 65 Ill., 69.)

*Unauthorized indorsement—Notice of limitation of agent's authority—Liability of drawee.*

- 6 (Colo. Appls., 1903). Plaintiff's bookkeeper had authority to indorse in blank certain checks payable by defendant, which came monthly to plaintiff, the indorsement to be used only in order to deposit the checks to the credit of plaintiff with a bank, from which they passed through the clearing house and were paid by defendant, who had no knowledge of the limitation. *Held*, that the bank was not liable for the amount of a check which the bookkeeper negotiated to others after indorsing it in blank, defendant not being put on inquiry by the fact that the check bore the indorsements of parties to whom it was negotiated, while former checks bore the bookkeeper's indorsement alone. (*Wedge Mines Co. v. Denver Natl. Bank*, 5 B. C., 619; 73 Pac. Rep., 873.)

*Drafts drawn by agent—Bank's knowledge of lack of authority.*

- 7 (Nebr. Sup., 1903). Where a former agent, without actual authority, and with nothing due him, has drawn on his former principal through a bank instructed by the principal to pay such drafts, it is the bank's duty, as soon as it learns of the agent's lack of authority, to retain any proceeds of the draft which have not been paid out. (*Baeschlin et al. v. Chamberlain Banking House*, 5 B. C., 331.)
- 8 (Nebr. Sup., 1903). In a suit by the bank to recover for the amount paid on such a draft, it can recover only the amount paid before receiving notice of the agent's want of authority. That the remainder had been previously placed to the agent's credit in the bank is not sufficient. (*Ib.*)

## PAYMENT OF CHECKS MADE PAYABLE TO FICTITIOUS PAYEES.

- 1 (N. Y.). A check made payable to a fictitious payee is as a general rule payable to bearer, and if negotiated by the maker is "as against the maker and all persons having knowledge of the facts as if payable to bearer."
- Shipman *v.* Bank of State of N. Y., 126 N. Y., 318;  
Phillips *v.* Merchants' National Bank, 140 N. Y., 556.
- 2 (Ohio). A fictitious payee is not a person who is not in existence, but whom the drawer believes to be in existence. Where by the fraud of a third person a depositor is induced to draw his check to a non-existing person, the drawer being in ignorance of the fact and intending no fraud, payment by the bank of the check upon an indorsement representing such payee is not payment. (*Armstrong v. Pomeroy* National Bank, 46 Ohio St., 512.)
- 3 (Ohio). A building and loan association made a loan to one B upon the representation of its attorney and agent that a person named B desired the loan. The loan having been approved by the proper officers, a check was drawn payable to B and delivered to the attorney, who indorsed it and appropriated the money to his own uses. There was in fact no such person as B, and it appeared that the association had made no inquiries as to the existence of such person. *Held*, that the association was guilty of negligence, barring a recovery from the bank of the amount called for by the check. (*Burnet*

## CHECKS—Continued.

## PAYMENT OF CHECKS MADE PAYABLE TO FICTITIOUS PAYEES—continued.

Woods Building and Savings Co. v. German National Bank of Cincinnati, 3 Ohio N. P., 84.)

## WHAT CONSTITUTES PAYMENT.

- 1 (U. S. C. C. A., 1903). When, in the absence of fraud, a check is presented in bank by the payee, and received as a deposit, and credited on his account in the bank, the check is paid. The transaction is the same in effect as if the cash had been handed to the payee, and by him returned to the bank. This result does not depend on the amount of cash in the bank being equal to the check, nor on the financial condition of the bank, as shown later on a settlement of its affairs after insolvency. (*Montgomery Co. v. Cochran et al.*; *Cochran et al. v. Montgomery Co.*, 126 Fed. Rep., 456.)
- 2 (Cal., 1899). A depositor gave his check for the bank's draft payable to another party, and the check was charged against him; but the draft was protested and returned to the bank. *Held*, that there was no payment of the check which could withdraw from the amount of the deposit. (*Dingley v. McDonald et al.*, 2 Banking Cases, 153; 124 Cal., 90.)
- 3 (Ky., 1899). Where a bank received a check by mail, with directions to send "cash for same," it should have adopted the usual method of sending money to the point indicated, which was by registered package; and therefore the deposit of the money in the post-office without having the package registered or taking a receipt for it did not constitute a payment, though the bank may have notified the post-master that it wished to have the package registered. (*Clay City Nat. Bank v. Conlee*, 51 S. W., 615.)

## PAYMENT AFTER DEPOSITOR HAS DIRECTED BANK NOT TO PAY.

- 1 (N. Y., 1899). Where a bank, through an oversight, pays a check drawn by a depositor to the order of a third party after it has received an order from the depositor not to honor the check, the bank is liable to its depositor for the amount thereof, although there was an agreement between the bank and the depositor to the effect that the bank would not be liable for failure to obey such orders, but would merely endeavor to execute them. (*Elder v. Franklin Nat. Bank of City of New York*, 1 Banking Cases, 507; 55 N. Y. Sup., 576.)

## RIGHTS AND LIABILITIES OF DRAWER.

*Time of presentation in order to charge drawer or indorser.*

- 1 (Ill.). In order to fix the liability of the drawer of an inland bill of exchange or check in case of nonpayment, the holder should present the bill or check to the person or bank on which it is drawn within business hours of the day next succeeding the receipt of the paper and give notice of the dishonor to the drawer. (*Bickford v. First Nat. Bank of Chicago*, 42 Ill., 238.)
- 2 (Ill.). Where a notary public takes a check to a bank during banking hours for the purpose of demanding payment thereon, and finding the bank's doors closed, goes to the president and demands payment of him, there is sufficient presentment. (*Judgment, Park Nat. Bank v. Niblack*, 67 Ill. App., 583, reversed; *Niblack v. Park Nat. Bank*, 48 N. E., 438; 169 Ill., 517.)
- 3 (Nebr.). The indorser of an ordinary check is released from liability thereon where the indorsee might have presented the check for payment within twenty-four hours, but sent the same by a circuitous route, so that it was not presented until five days, when payment was refused. (55 N. W., 1064; 37 Nebr., 500, affirmed; *First National Bank v. Miller*, 62 N. W., 195; 43 Nebr., 791.)

## CHECKS—Continued.

## RIGHTS AND LIABILITIES OF DRAWER—continued.

*Drawer may revoke before acceptance.*

- 4 (La., 1899). A check issued by the bank should not be countermanded as to its payment without cause. (*Valdetero v. Citizens' Bank of Jennings et al.*, 1 Banking Cases, 601; 51 La. Ann., 1651.)
- 5 (La., 1899). A loan promised by a cashier personally and as cashier, to enable one to go in search of the president who is sick in body and mind and has disappeared, has consideration enough to hold the bank for the promise of its cashier, for which loan the latter issued a check, and without cause shown stopped payment without proof enough of any cause for stopping it, after the one who went in search had left and was performing his part of the agreement. (*Ib.*)
6. A check may be revoked by the drawer at any time before acceptance. (Ala.) *National Commercial Bank v. Miller & Co.*, 77 Ala., 168; (Ky., 1901) *Weilands Admr. v. State National Bank of Maysville*, 65 S. W. Rep., 617; (Ky.) *Tramel v. Farmers' National Bank*, 11 Ky. Law. Rep., 900; (Mo.) *Albers v. Commercial Bank*, 85 Mo., 173; (N. Y.) *Dykers v. Leather Manufacturers' Bank*, 11 Paige, 612.

*When drawer may not revoke.*

- 7 (N. Dak., 1901). A cashier's check, being merely a bill of exchange drawn by a bank upon itself, and accepted in advance by the act of its issuance, is not subject to countermand, like an ordinary check, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable promissory note payable on demand. (*Drinkall v. Movious State Bank*, 88 N. W. Rep., 724; 4 Banking Cases, 222.)

*Release of drawer.*

- 8 (U. S. C. C., 1884). Where the indorsee of a draft accepts the drawee's check in payment, instead of cash, and neglects to present it for payment or certification until the next day, and the check is dishonored in consequence of the delay, and the draft has to be protested for non-payment, the drawer can not be held liable. (*Merchants' National Bank of the City of New York v. Samuel et al.*, 20 Fed. Rep., 664.)

*When drawer's action barred by his negligence.*

- 9 (Chio). A building and loan association made a loan to one B upon the representation of its attorney and agent that a person named B desired the loan. The loan having been approved by the proper officers, a check was drawn payable to B, and delivered to the attorney, who indorsed it and appropriated the money to his own uses. There was, in fact, no such person as B, and it appeared that the association had made no inquiries as to the existence of such person. *Held*, that the association was guilty of negligence, barring a recovery from the bank of the amount called for by the check. (*Burnet Woods Bldg. and Sav. Co. v. German Nat. Bank of Cincinnati*, 3 Ohio N. P., 84.)
- 10 (N. Y., 1902). The drawer of a check is not required to so prepare it that no one else can successfully tamper with it. (*Critten et al. v. Chemical Nat. Bank*, 63 N. E. Rep., 969; 171 N. Y., 219.)

*Drawer owes no duty as to genuineness of indorsements.*

- 11 (Iowa, 1897). A drawer of a check owes no duty to the drawee or to an indorsee to investigate the genuineness of an indorsement, or for that purpose to examine with diligence the check upon its return. (*German Sav. Bank v. Citizens' Nat. Bank*, Iowa, 70 N. W., 769; 101 Iowa, 530.)

*Liability of drawer to bank for overdraft.*

- 12 (N. Y., 1898). A bank receiving from a depositor, in the usual course of business, a check drawn to its order, before its maturity, is, in the absence of evidence to the contrary, entitled to presume that it was given for a valuable consideration, and if, under such circumstances,

## CHECKS—Continued.

## RIGHTS AND LIABILITIES OF DRAWER—continued.

the bank practically purchases such check by paying money on the faith of the first-mentioned check, on a check drawn by such depositor, the drawer of the first-mentioned check is not entitled to show equities existing between the drawer and drawee at the date of the check to defeat the bank's title thereto. And in an action on the check against the drawer, the fact that the bank, after paying for the check, charged the amount thereof back to such depositor is immaterial. (*Riverside Bank v. Woodhaven Junction Land Co. et al.*, 1 Banking Cases, 297; 34 Hun., 359.)

*Liability of drawer to holder; limitations.*

- 13 (Cal., 1901). The drawer of a dishonored check, who has been notified of its dishonor, is not relieved of any part of his liability by the insolvency of the drawee occurring after notice of dishonor. (*Garthwaite et al. v. Bank of Tulare*, 4 Banking Cases, 8; 134 Cal., 237; 66 Pac. Rep., 326.)
- 14 (Ga., 1900). Ordinarily the drawer is not bound until payment is demanded and refused, but presentation is not necessary when the drawer, at the time of its delivery, had no funds to his credit in the bank on which it was drawn. In that event the statute begins to run from the date of the check. (*Haynes v. Wesley*, 3 Banking Cases, 240; 112 Ga., 668.)
- 15 (Ga., 1900). By the execution and delivery of an ordinary check the drawer contracts with the payee that the bank will pay to the latter or his order the amount designated on presentation. Being a simple contract in writing, the limitation prescribed by the statute in which suit may be brought for its enforcement is six years from the date of presentation and refusal to pay, unless presentation is in law excused. (Ib.)
- 16 (Mich., 1902). Defendants sent plaintiff a check on account, which the latter deposited for collection. The bank forwarded it by mail to the bank on which it was drawn. Payment was not made promptly, and the latter bank subsequently became insolvent. There was evidence that defendants had a balance in the bank sufficient to pay all outstanding checks, and that if the check had been presented it would have been paid. Defendants had information from which they might infer that the bank was not strong, but it did not appear that they had any reason to suppose that if the check was properly presented in a reasonable time it would not be paid. Held, that in an action on the unpaid check it was error to instruct that defendants committed a fraud in sending plaintiff the check, and were not entitled to notice of nonpayment. (*Carson, Pirie, Scott & Co. v. Fincher et al.*, 89 N. W. Rep., 570; 4 Banking Cases, 315; 129 Mich., 687.)
- 17 (Mich., 1902). It was proper to instruct that the bank on which the check was drawn was not a suitable agent for its collection. (Ib.)

## LIABILITY OF BANK TO DRAWER FOR REFUSAL TO PAY CHECK.

- 1 (Ga.). Where a bank refused to pay a check drawn by a customer who had enough funds on deposit to pay the same, the customer, though there was no proof of special damages, was not confined to nominal but was entitled to "temperate" damages. (*Atlanta Nat. Bank v. Davis*, 23 S. E., 190; 96 Ga., 334.)
- 2 (Ill., 1901). Where a check is drawn by a person in trade in favor of and delivered to a third person, who presents the same to the bank on which it is drawn for payment, and payment is refused for want of funds, when there are ample funds in the bank belonging to the drawer of the check and subject to its payment, such refusal is wrongful, and entitles the drawer of the check to an action for

## CHECKS—Continued.

## LIABILITY OF BANK TO DRAWER FOR REFUSAL TO PAY CHECK—continued.

wrongfully slandering his credit in his business. (*Hanna v. Drovers' Nat. Bank*, 92 Ill. App., 611, judgment affirmed, 62 N. E., 556.)

- 3 (Ill., 1901). In an action against a bank for damages for injuring plaintiffs' credit by refusing to pay their checks when they had money to meet them on deposit, defendant filed the general issue, and pleaded a judgment in an action between plaintiffs and another adjudicating that all the money deposited with defendant by plaintiffs when payment of the checks was refused belonged to such customer, and was held by plaintiffs in trust for him. Plaintiffs' demurrer to such plea was sustained. Defendant then filed a notice of defense setting up the same judgment. On the trial the court admitted such judgment in evidence. *Held*, that in the absence of anything to show on what ground the demurrer was sustained, it does not necessarily appear that such rulings were inconsistent. (*Hanna et al. v. Drovers' Nat. Bank*, 62 N. E. Rep., 556; 4 Banking Cases, 174; 192 Ill., 252.)
- 4 (Ill., 1901). Where a banker has notice of the fact that money deposited belongs to another than the depositor, it may refuse to pay his check and be compelled to pay to the real owner. (Ib.)
- 5 (Kans., 1898). A judgment for one dollar of actual damages, in a suit against a bank by a depositor for injury to his business standing, caused by a refusal to honor his check drawn in favor of a third person, will be considered as for a nominal sum only, and will not be a basis for the allowance of an extra amount as exemplary damages. (*First Nat. Bank v. Kansas Grain Co.*, 55 P., 277.)
- 6 (Kans. Sup., 1902). A bank is liable in damages resulting from a non-fulfillment of its contract to pay the money of its depositor on demand, to the same extent and for the same reason that other persons are liable for the nonfulfillment of contracts. The measure of its liability depends upon the circumstances of each individual case. (*Kleopfer v. First Natl. Bank of Herington*, 5 B. C. 150; 70 Pac. Rep. 880.)
- 7 (Ky., 1896). A bank may properly refuse to honor the check of a depositor who is indebted to it on a past-due note for an amount larger than the sum on deposit. (*Mt. Sterling Nat. Bank v. Green* (Ky.), 35 S. W., 911; 99 Ky., 262.)
- 8 (Ky., 1896). One who draws a check on a bank in which he has enough funds for its payment, not encumbered by an earlier lien in favor of the bank, may sue such bank for damages, on its refusal to pay the check to the drawee. (Ib.)
- 9 (Mass. Sup., 1903). Where in an action against a bank for refusal to honor a depositor's check, the plaintiff was and had been a trader engaged in business, and there was evidence that his business amounted to \$150,000 a year, and that he had sufficient funds in the bank to meet the check, he was entitled to recover substantial damages. The liability was not limited to the amount of plaintiff's funds in defendant's hands at the time, nor to the amount of checks payment of which was refused. Plaintiff being in good standing and credit the bank was not entitled to set off unmatured notes against its liability. (*Wiley v. Bunker Hill Natl. Bank*, 5 B. C., 627; 67 N. E., 655.)
- 10 (Minn., 1896). When a bank refuses to pay a check drawn by a depositor against a fund sufficient to pay it, the depositor is not, in an action for the slander, restricted to nominal damages. (*Svensden v. State Bank*, 65 N. W., 1086; 64 Minn., 40.)
- 11 (Nebr., 1899). Proof by the drawer of a check that, when presented, he had a sufficient deposit with the drawee subject to check to pay it, and that afterwards he was compelled to pay the amount of the check to the holder because of the unwarranted refusal of the drawee to pay it, supports a judgment for the amount paid out by the drawer and such other damages as are alleged and proved. (*First Nat. Bank v. Railsback*, 78 N. W., 512; 58 Nebr., 248.)

## CHECKS—Continued.

## LIABILITY OF BANK TO DRAWER FOR REFUSAL TO PAY CHECK—continued.

- 12 (Nebr., 1902). Deposits in a bank create between it and the depositor the relation of debtor and creditor, and, as long as this relation exists, the bank is in duty bound to honor the checks of the depositor, and it can not refuse to do so on the ground that the money deposited belongs to some other person, or that the title of the depositor to it is defective. (*Nehawka Bank v. Ingersoll et al.*, 89 N. W. Rep., 618; 4 Banking Cases, 333.)
- 13 (Nebr., 1902). Knowledge by the bank that a draft has been drawn on the depositor and is outstanding would not justify a refusal by the bank to pay out the money deposited when demanded by the depositor. The law would not allow the bank to set up a *jus tertii* against the demand. (Ib.)
- 14 (N. Y.). The implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole or in installments by demanding portions; and whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises, and the statute of limitations begins to run as against the installments so due and payable. (*Viets v. The Union National Bank of Troy*, 101 N. Y., 563.)
- 15 (N. Y.). While a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action, in case he has funds in bank to meet the check, and the refusal was without his authority. (Ib.)
- 16 (N. Y.). The refusal of the bank to pay a check upon presentation gives the drawer a right of action in case he has funds in the bank to meet the check, and the refusal to pay was without authority. (*Brooke v. Tradesmen's National Bank*, 22 N. Y. St., 633; 68 Hun., 129.)
- 17 (N. Y.). The measure of damages will be the amount of actual loss the party has sustained, which may fairly and reasonably be considered as naturally arising from the breach of the contract, according to the usual course of things. (Ib.)
- 18 (N. Y.). The ordinary amount of damages in such case would be the amount of check, interests, and costs. (Ib.)
- 19 (N. Y.). The immediate entering of a judgment against the drawer, and the seizure of his business by the sheriff in consequence of the failure of the bank to pay the check, is not an injury for which the bank would be liable. (Ib.)
- 20 (N. Y.). Where a bank, in consequence of an error, fails to pay a depositor's check when presented, but discovers the error and pays the check five days later, the depositor can recover only nominal damages against the bank. (*Burroughs v. Tradesmen's National Bank (Sup.)*, 33 N. Y. S., 864.)
- 21 (N. Y.). Where a plaintiff in an action for tort for injury to his credit had deposited a note with a defendant bank to be discounted, and thereafter, and subsequent to the maturity of the note, drew several checks on the bank, which were dishonored because the note deposited had not been paid when due, an instruction that if the jury believed the note was discounted, and that the defendant bank acted through malicious, wrongful, and improper motives, it was liable for the actual money loss of the plaintiff, and also for such substantial damages for the impairment of his credit, and for his feelings and mental anxiety over the matter, as directly resulted from such wrongful acts was proper. (*Davis v. Standard Nat. Bank*, 63 N. Y. S., 764; 50 App. Div., 210.)

## CHECKS—Continued.

## LIABILITY OF BANK TO DRAWER FOR REFUSAL TO PAY CHECK—continued.

- 22 (N. Y.). Where the defendant bank dishonored the checks of the plaintiff on four successive occasions, and without reasonable excuse, when the plaintiff had money deposited in the bank, and great injury resulted to the credit of the plaintiff from such action, such acts are sufficient to warrant the legal inference that the bank acted with malice. (Ib.)
- 23 (Tenn., 1900). Substantial damages may be recovered against a bank for wrongfully, willfully, and maliciously refusing to honor a depositor's check, if he is a "trader," without alleging special damages. (J. M. James Co. v. Continental Nat. Bank, 2 Banking Cases, 573; 105 Tenn., 1.)
- 24 (Va., 1902). A declaration alleged that plaintiff, being a depositor in the defendant bank, drew a check thereon, but that, though his deposit was sufficient to pay such check, it was twice presented for payment and each time dishonored, and charged that by reason of the negligence of defendant, and of the wrongs thus committed against plaintiff, he has been greatly injured in his good name and credit, and thereby suffers great loss. *Held*, that plaintiff was entitled to prove exemplary damages. (Wood v. American Nat. Bank, 40 S. E. Rep., 931; 4 Banking Cases, 340; 100 Va., 306.)
- 25 (Va., 1902). Plaintiff's check was wrongfully dishonored by the defendant bank, and, when plaintiff asked defendant's bookkeeper why it was dishonored, the bookkeeper said he knew nothing about the matter. Plaintiff then drew another check for the same amount to the same payee, and went with him to the bank. The teller again refused to pay, saying there were no funds, but, after consultation with the bookkeeper, said there had been a mistake, and paid the check. The relations between plaintiff and defendant had always been pleasant, and defendant promptly wrote plaintiff, disclaiming all intent to injure him, and offered to do all it could do to remove any injurious impressions arising from its mistake, and authorized plaintiff to use its letter for that purpose. *Held*, that plaintiff was not entitled to exemplary damages. (Ib.)
- 26 (Va., 1902). Exemplary damages are allowable only where there is misconduct or malice or such reckless negligence as evinces a conscious disregard of the rights of others, and where these elements are lacking only compensatory damages are permissible. (Ib.)

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER.

*Liability of bank to holder in States where issuance of a check is held not to be an equitable assignment of the deposit.*

All the courts of England and America, except the State courts of the States of Illinois, Iowa, Kentucky, Louisiana, Nebraska, South Carolina, and Texas, hold that the issuance of a check does not constitute an equitable assignment of the deposit before acceptance, and that the payee or holder (before acceptance) has no right of action against the bank.

- 1 (U. S. Sup. Ct., 1869). The holder of a bank check has no right of action upon it against the bank unless under special circumstances, such as an acceptance of the check by the bank. (Bank of Republic v. Millard, 77 U. S., 152.)
- 2 (U. S. Sup. Ct., 1876). The holder of a check before it is accepted by the bank can not maintain an action on it against the bank, as there is no privity of contract between them. (First National Bank of Washington v. Whitman, 94 U. S., 343.)
- 3 (U. S. Sup. Ct., 1897). As between a check holder and the bank upon which such a check is drawn it is settled that, unless the check be accepted by the bank, an action can not be maintained by the holder against the bank. (Fourth Street National Bank of Philadelphia v. Yardley, 165 U. S., 634.)



## CHECKS—Continued.

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER—continued.

- 4 (U. S. C. C. A., 1894). Drafts for part of a fund in the hands of a debtor of the drawer do not, without acceptance by the drawee, constitute an appropriation of part of such fund, or an equitable assignment thereof. (*Bosworth v. Jacksonville National Bank*, 64 Fed Rep., 615.)
- 5 (Ala.). A check drawn and delivered to the person to whose order it is payable does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given. It may be revoked by the drawer at any time before acceptance, and is revoked by his death; and there being no privity, expressed or implied, between the payee and the drawee, the former can maintain no action on or against the latter. (*National Commercial Bank v. Miller & Co.*, 77 Ala., 168.)
- 6 (Cal. Sup., 1902). An ordinary bank check, for a part only of the sum on deposit, does not operate at the time of delivery as an equitable assignment pro tanto of the sum on deposit, and an attachment on the deposit will take precedence of an unrepresented check. (*Donohoe-Kelly Banking Co. v. Southern Pacific Co. et al.*, 5 B. C., 224; 71 Pac. Rep., 93.)
- 7 (Kans.). The holders of the checks of a firm can maintain an action upon a contract made by the bank with the firm to pay the checks. (*Chanute Nat. Bank v. Crowell*, 6 Kans. App., 533.)
- 8 (Mo.). Payment by a bank of a check upon a forged indorsement, where the deposit of the drawer exceeded the amount of the check, gave no right of action against the bank to the payee of the check. (*J. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App., 132.)
- 9 (Nebr., 1897). A commission firm sold cattle for plaintiff, depositing proceeds in a bank to their own credit, and gave plaintiff a check for the amount less charges. The bank knew nothing of the source from which the deposit was derived, and paid it out on checks of the firm, and when the plaintiff's check was presented it was refused payment for want of funds. *Held*, that the fact that, between the time the deposit was made and the time the check was presented, the bank had collected a draft in favor of the firm in excess of the amount of the check, and had credited the proceeds to the firm, at the same time charging it with the amount of a demand note it held against the firm, did not render it liable for the amount of plaintiff's check, where the draft was deposited at the time the note was given, and as collateral to it. (*Pederson v. South Omaha Nat. Bank*, 71 N. W. Rep., 973.)
- 10 (N. C., 1896). The holder of a check can not sue the bank on which it is drawn until such check is accepted by the bank. (*Commercial National Bank v. First National Bank*, 24 S. E., 524; 118 N. C., 783.)
- 11 (N. C., 1896). A stipulation stamped on the face of a check, that it will not be paid to a certain company or its agents is valid. (*Ib.*)
- 12 (N. J.). The holder of a check on a bank can not sue the bank for refusal to pay it on presentation, though the drawer have sufficient on deposit to meet it. (*Creveling et al. v. Bloomsbury National Bank*, 46 N. J., 255.)
- 13 (N. Y.). The implied engagement on the part of a banker to pay the checks of his depositor does not inure to the benefit of the holder of a check so as to enable him to enforce payment thereon against the bank prior to acceptance, and in the absence of assent by the banker the giving of the check does not operate as a transfer or assignment of the debt created by the making of the deposit. (*First National Bank of Union Mills v. Clark*, 134 N. Y., 368.)
- 14 (N. Y. App., 1892). The giving of a check by a bank depositor for the full amount of the deposit does not operate as an assignment to the holder of the check so as to enable him to enforce payment thereon against the bank prior to its acceptance of the check. (*First National Bank v. Clark*, 32 N. E., 38; 134 N. Y., 368.)

## CHECKS—Continued.

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER—continued.

- 15 (Ohio. Sup.). An action can not be maintained against a bank by the holder of a check for refusal to pay it, unless the check has been accepted, although there is to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check. (*Cincinnati, H. and D. R. Co. v. Metropolitan Nat. Bank*, 42 N. E., 700; 54 Ohio St., 60.)
- 16 (Okla., 1898). A draft drawn in the ordinary form does not constitute an equitable assignment pro tanto of funds in the hands of the drawee to the credit of the drawer before such draft has been accepted or presented for payment. (*Guthrie Nat. Bank v. Gill*, 1 Banking Cases, 183; 6 Okla., 560.)
- 17 (Okla., 1898). There is an implied promise on the part of a bank, when receiving deposits, to pay them out, on the checks of the depositor, to any person in whose favor he may draw the same; and the check holder is subrogated to the right of the depositor in so much of the deposits as the check may call for, remaining in the bank to the credit of the depositor at the time when such draft is presented for payment. (Ib.)
- 18 (Okla., 1898). Where a depositor makes a draft on a bank in which he has funds to his credit and afterwards makes a general assignment for the benefit of his creditors, and the holder of such draft presents the same to the drawee for payment after such assignment is made and payment is refused, he can not maintain an action against the drawee and recover on said draft, although at the time the draft was presented for payment the drawee did not know of the assignment, but learned of such assignment before making payment and by reason of such knowledge refused payment. (Ib.)
- 19 (Tenn.). The holder of a check can not sue the bank on which it is drawn unless it has been accepted by the bank. (*Pickle v. People's National Bank* (*Pickle v. Muse*), 12 S. W., 919; 88 Tenn., 380.)
- 20 (W. Va.). A general assignment for the benefit of creditors does not defeat the check holder, although the check be not presented to the bank for payment until after such assignment. (*Hulings v. Hulings Lumber Company et al.*, 18 S. E. Rep., 620; 38 W. Va., 351.)

*Liability of bank to holder in States where issuance of check is held to be an equitable assignment of the deposit before acceptance.*

In Illinois, Iowa, Kentucky, Louisiana, Nebraska, South Carolina, and Texas the State courts hold that the holder of a check can sue upon it if when presented the bank has a sufficient amount to the credit of the drawer to pay it. In these States, however, the Federal courts follow the general rule of commercial law that only the owner of the deposit has a right to sue.

*Illinois.*

- 1 (Ill.). The check of a depositor, on a bank in which he has funds sufficient to meet it, transfers to the payee, as between him and the depositor, the title of so much of the deposit as the check calls for, to remain in the bank until demanded by the presentation of the check. (Judgment (1899), 80 Ill. App., 204, reversed. *Rickert v. Suddard*, 56 N. E., 344; 184 Ill., 149.)
- 2 (Ill.). Where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and a transfer of the check carries with it the title to the amount named in the check to each successive holder. (*The Union National Bank v. The Oceana County Bank*, 80 Ill., 212.)
- 3 (Ill.). After a check has passed into the hands of a bona fide holder it is not in the power of the drawer to countermand the order of payment. (Ib.)

## CHECKS—Continued.

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER—continued.

- 4 (Ill.). An instrument drawn by a depositor on a bank in the following form, after giving the date and the name of the bank, "Pay to A. and B., for account of C. & Co., ten hundred and eighteen 23-100 dollars," and signed by the depositor, is a valid bank check, and will operate to transfer to the payees an amount of the drawers' funds on deposit equal to the sum named on its face. The words "for account of C. & Co." do not change its character as a check. A bill or note, without at all affecting its character as such, may state the transaction out of which it arose or the consideration for which it was given. (*The Ridgely National Bank v. Patton & Hamilton*, 109 Ill., 479.)
- 5 (Ill.). A bank check payable to attorneys on account of a debt due from the drawer to the clients of the attorneys vests the legal title in the payee named as trustees for the clients, and a suit thereon against the bank is properly brought in the names of the payees. (Ib.)
- 6 (Ill.). A debtor gave his check on a bank for the amount of his indebtedness, payable to the attorneys of the creditor, which the bank refused to pay, alleging an agreement of the debtor to apply his deposits on other indebtedness. It was held that the bringing of an action by the creditor against his debtor did not estop him from bringing an action on the check in the name of his attorneys, the payees, against the bank. (Ib.)
- 7 (Ill.). If, at the time of presenting a check for payment, the deposit has been lawfully applied by the bank on a note of the drawer, the holder can not enforce payment of the check. (*Merchants' Nat. Bank v. Maple*, 65 Ill. App., 484.)
- 8 (Ill.). When payment of a check is refused because the drawer has no funds, there is no presumption that the check remains outstanding for payment, and no duty devolves on the bank to reserve from a future deposit an amount large enough to pay it. (*Gilliam v. Merchants' Nat. Bank*, 70 Ill. App., 592.)
- 9 (Ill.). Plaintiff presented a check to the bank on which it was drawn and the bank refused payment for want of funds. On the next day the drawer deposited sufficient funds to meet plaintiff's check, and the day following made a general assignment, and the assignee entered upon his duties. Plaintiff then presented his check for payment. *Held*, that the bank was not liable to him. (*Gilliam v. Merchants' Nat. Bank*, 70 Ill. App., 592.)
- 10 (Ill.). Where a bank certifies a check, it is manifest that the bank has enough funds of the drawer at the time of the certification on deposit to pay it, and the transfer of the check carries with it, as against the bank, title to the amount named in it. (*American Trust and Savings Bank v. Crowe & Gillen*, 82 Ill. App., 537.)
- 11 (Ill.). Where a bank pays checks drawn upon it to any other than a person to whose order they are made payable, it does so at its peril. (*T. M. Sinclair & Co. v. Goodell*, 93 Ill. App., 592.)
- 12 (Ill.). A bank, which has on deposit funds sufficient to pay the same, can not refuse to pay a check presented by a bona fide holder, though the maker owes the bank on an overdue note more than the amount of his deposit, unless such note has been charged against such deposit before presentment of the check. Judgment, *Park Nat. Bank v. Niblack*, 67 Ill. App., reversed. (*Niblack v. Park Nat. Bank*, 48 N. E., 438; 169 Ill., 517; 39 L. R. A., 159.)
- 13 (Ill.). A bank is not justified in refusing to pay a check because the drawer orders it not to pay it, if it has on deposit sufficient funds of the drawer to pay the check when presented for payment. Judgment, 69 Ill. App., 681, affirmed. (*Gage Hotel Co. v. Union Nat. Bank*, 49 N. E., 420; 171 Ill., 531; 39 L. R. A., 479.)
- 14 (Ill.). The delivery of a check drawn by a failing bank of another State on funds deposited to its credit in a resident bank of the State does

## CHECKS—Continued.

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER—continued.

not give the drawee such an interest in the funds deposited as he can enforce in equity to the prejudice of the resident bank. (*Fort Dearborn Nat. Bank v. Wyman*, 80 Ill. App., 150.)

*Iowa.*

- 15 (Iowa Sup. Ct.). The holder of an unaccepted check may bring suit thereon in his own name. (*Roberts v. Corbin*, 26 Iowa, 315; *Schollmier v. Schoendelen*, 78 Iowa, 426; *May v. Jones*, 87 Iowa, 188; *Thomas v. Exchange Bank*, 99 Iowa, 202; *Bloom v. Winthrop State Bank* (Iowa Sup., 1903), 5 B. C., 607; 96 N. W. Rep., 733.)

*Kentucky.*

- 16 (Ky., 1899). A bank agreed through its cashier to credit a customer by the amount of a draft drawn by him on consignees of produce, with a bill of lading attached; and that the customer should then draw checks on the bank against this cash credit for the purchase price of the produce in favor of its vendors. *Held*, that the bank could not refuse payment of such checks after it had received the draft, and credited the customer by its amount, pursuant to such agreement. (*German Nat. Bank v. Grinstead et al.*, 2 Banking Cases, 50; 52 S. W., 951.)
- 17 (Ky.). The demand fixes the liability of the bank and the holder can prosecute an action against the bank to recover the amount of the check if payment is refused. (*Chambers v. Northern Bank of Kentucky*, 5 Ky. Law Rep., 123.)
- 18 (Ky. Appeals, 1903). The holder of an unaccepted check may maintain an action thereon. (*Columbia Finance and Trust Co. v. First National Bank*, 5 B. C., 611; 76 S. W. Rep., 156.)

*Louisiana.*

- 19 (La.). Our law differs from the common law doctrine that where a check has been presented to and acceptance refused by a bank there being no privity, the holder of the check can not sue the bank. A check duly notified to the bank constitutes an equitable assignment of the fund against which it is drawn. (*Gordon, etc., v. Muchler*; *Louisiana National Bank v. Union National Bank*, 34 La. Ann., 604.)
- 20 (La., 1897). An action does not lie against a bank on a check drawn upon it unless the check has been accepted or the bank notified, and a holder of a check drawn upon a bank, but not presented before the failure of the bank, is not entitled to have the check paid by the liquidators out of the dividend assigned to the drawer. (*State ex rel. St. Amand v. Bank of Commerce*, 22 So. Rep., 207; 49 La. Ann., 1060.)

*Nebraska.*

- 21 (Nebr.). If a bank having funds of the drawer refuses to pay a check the holder may recover of the bank in an action brought in its own name. (*Fonner v. Smith*, 31 Nebr., 107.)
- 22 (Nebr., 1902). The indorsee of a check is possessed of the legal title thereto, and is the proper party plaintiff in an action for its collection. (*Commercial State Bank of Genoa v. Rowley*, 89 N. W. Rep., 765; 4 Banking Cases, 393.)
- 23 (Nebr. Sup., 1898). A check upon a bank by a depositor operates a transfer of its amount to the payee if on deposit at the time of presentation, and the payee or holder may on refusal of payment maintain a suit on the instrument for the recovery of its stated sum. (*Columbia Nat. Bank v. German Nat. Bank*, 1 Banking Cases, 43; 56 Nebr., 803.)
- 24 (Nebr. Sup., 1898). As against the holder of a check against an account of a depositor, the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent. (*Ib.*)

## CHECKS—Continued.

## OBLIGATIONS OF BANK TO PAYEE OR HOLDER—continued.

- 25 (Nebr. Sup., 1903). The payee of a check has a right of action against the drawee if the latter has funds to meet it when it is presented. (*Falls City State Bank v. Wehrle*, 5 B. C., 431; 93 N. W. Rep., 994.)

*South Carolina.*

- 26 (S. C.). The holder of a check may recover the amount thereof from the bank on which it is drawn if the bank having funds on hand belonging to the drawer refuses to pay the check. (*Fogarties & Stillman v. State Bank*, 12 Rich. Law, 518, 78 Am. Dec., 468.)
- 27 (S. C., 1893). The holder of a check on a bank in which the drawer has on general deposit to his credit funds sufficient to pay the check may maintain action against the bank after demand and refusal without acceptance or certification. (*Fogarties & Stillman v. State Bank* followed and approved. (*Simmons v. Bank of Greenwood*, 41 S. C., 177.)

*Texas.*

- 28 (Tex., 1888). The deposit of funds in a bank forms sufficient consideration to authorize the holder of a check drawn against such funds by the depositor to maintain a suit against the bank on its refusal to pay. (*First National Bank v. Randall*, 1 Tex. App. Civ. (White & Wilson), 546, par. 975.)

## HOLDER'S RIGHTS AS AGAINST GARNISHMENT BY DRAWER'S CREDITOR.

- 1 (Ky., 1899). A check drawn prior to but presented subsequent to the service of an attachment upon the bank as garnishee is, to the amount for which it is drawn, an appropriation of any funds in the bank to the credit of the drawer at its presentation, regardless of the attachment lien. (*Winchester Bank v. Clark County Nat. Bank*, 51 S. W. Rep., 315; 1 Banking Cases, 515.)
- 2 (Wash., 1896). Where checks on a general deposit are not presented to the bank till after it has been garnished by a judgment creditor of the depositor, though drawn before garnishment, the fund is subject to the satisfaction of the judgment. (*Commercial Bank v. Chilberg*, 44 Pac. Rep., 264; 14 Wash., 247.)

## WHETHER CHECK ACCEPTED FOR PAYMENT OR COLLECTION.

- 1 (U. S. C. C., 1883). Where checks are deposited to the credit of a depositor the right to check against the balance thus created is a gratuitous privilege and the bank may revoke the credit if the checks are not collected. (*Balbach v. Frelinghuysen*, 15 Fed. Rep., 675.)
- 2 (Ala.). Where it is shown to be out of a bank's course of business to receive for collection checks drawn on it by its depositors, and a check on it drawn by one of its depositors in favor of another is presented by the latter and the amount thereof is credited on his pass book as a deposit, and the check is placed on the file of paid and canceled checks, and afterwards the amount of the check is also entered to his credit and charged against the drawer on the books of the bank, these facts constitute a payment of the check, and the amount of it can not be withheld by the bank on discovering that the check was an unauthorized overdraft and the drawer was insolvent. (*City National Bank of Selma v. Burns*, 68 Ala., 600.)
- 3 (Ala.). A charge is erroneously and properly refused which affirms, as matter of law, that if the drawer and payee of a check are customers of the bank on which it is drawn the presentation of the check by the payee to the bank and the noting or entry of it by the bank on his pass book as a deposit do not operate as a payment of the check, and that if within a reasonable time the bank ascertains that the check is an unauthorized overdraft and offers to return it there is no liability to the depositor. (*Ib.*)

## CHECKS—Continued.

## WHETHER CHECK ACCEPTED FOR PAYMENT OR COLLECTION—continued.

- 4 (Ala.). In such case no presumption arises that the bank received the check merely for collection and in the capacity of agent for the holder; but a presumption of payment of the check does arise and the onus of overcoming that presumption rests upon the bank and it can only be removed by evidence that such was not the intention of the parties, derived from the course of business with the depositor or from contemporaneous acts or declarations. (Ib.)
- 5 (Ala.). If a holder of a check, with full knowledge that the drawer is without funds in the bank to meet it, and has no just reason to believe that the check will be honored in the absence of funds, he is wanting in good faith if he demands and receives payment, especially if it is known to him that the drawer is insolvent and the bank is ignorant of the insolvency. (Ib.)
- 6 (Ala.). In such case, fraud being imputed to the holder of the check, knowledge of the want of funds must be clearly traced to him. It can not be inferred from the relations existing between him and the drawer, however intimate, unless connected with inculpatory facts or circumstances. (Ib.)
- 7 (Ala.). When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank owe the amount until the check is collected. But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass book, and to draw against such deposits an indorsement of the words "For deposit" on a check so deposited "is, in the absence of a different understanding, presumptive of more than a mere agency or authority to collect;" it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority, not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the conditions and necessities of their business, may make it most available to their protection, and they may have it certified by the bank on which it is drawn. (*National Commercial Bank v. Miller & Co.*, 77 Ala., 168.)
- 8 (Ala., 1899). A bank received a draft from the drawer for collection; and, upon presenting it for payment, received from the drawee his check for the amount of the draft, drawn on another bank of the same town in which it was located. *Held*, that, as between itself and the drawer of the check, the bank had until the close of banking hours on the next secular day after receiving the check to present it to the drawee bank for payment—the time allowed by commercial law, as the bank in presenting the check was not the agent of its drawer. (*Morris v. Eufaula Nat. Bank*, 1 Banking Cases, 677; 122 Ala., 580.)
- 9 (Cal.). When checks on another bank are handed by a depositor to the receiving teller of a bank and are by the teller credited on the depositor's pass book, they are only received for collection, and if not paid on presentation may be returned and the credit in the pass book canceled. (*National Gold Bank and Trust Company v. McDonald*, 51 Cal., 64.)
- 10 (Ill., 1898). Plaintiff deposited with a banking firm two checks indorsed by him in blank, which the banking firm, after indorsing for collection to its credit, deposited with the defendant bank. *Held*, that defendant, having no knowledge to the contrary, was authorized to act upon the banking firm's indorsement of the checks and to proceed to collect them and credit the banking firm's account with the proceeds. (*Doppelt v. National Bank of the Republic*, 1 Banking Cases, 96; 175 Ill., 432.)
- 11 (Mass., 1899). The defendant bank received from plaintiff upon deposit a check indorsed without restriction and gave credit for it to the

## CHECKS—Continued.

## WHETHER CHECK ACCEPTED FOR PAYMENT OR COLLECTION—continued.

- depositor as cash in a drawing account, and while defendant was trying to get the maker to pay the check, a period of over two months, plaintiff's checks were honored by defendant at times when his account would not have been enough to meet them if the amount of the first-mentioned check had been charged back to plaintiff. There was no evidence as to any custom or agreement having a tendency to show that the bank received such check for collection as plaintiff's agent. *Held*, that a finding that the bank purchased such check was warranted by the evidence. (*Taft v. Quinsigamond Nat. Bank*, 1 Banking Cases, 99; 172 Mass., 363.)
- 12 (Mo. Sup., 1899.) The H. bank sent a draft, of which it was the holder for value, to the A. bank for collection, and the latter forwarded it to the plaintiff bank for collection and return. And plaintiff accepted the drawee's check on another bank in payment of the draft, which it delivered to the drawee, and remitted the amount of the draft to the A. bank. The check proving to be worthless, plaintiff brought an action against the A. bank to recover the amount of the remittance. *Held*, that when plaintiff received the check and surrendered the draft, it made the check its own and its liability to the H. bank became fixed—as much so as if it had received the cash; and there could be no recovery. (*National Bank of Commerce of Kansas City v. American Exch. Bank of St. Louis*, 2 Banking Cases, 101; 151 Mo., 320.)
- 13 (Nebr., 1898). Crediting the payee with the amount of a check as a deposit by the bank upon which it is drawn amounts to a payment of the check in money and a redeposit thereof. (*Bartley v. State*, 73 N. W., 744; 53 Nebr., 310.)
- 14 (N. J., 1900). Where one deposits in a bank a check or draft on a third party, it is a bailment, unless there is an understanding that he may at once draw against the deposit, or, being indebted to the bank, that the deposit may be applied on such indebtedness. (*Perth Amboy Gaslight Co. v. Middlesex County Bank*, 45 A., 704; 60 N. J. Eq., 84.)
- 15 (N. Y.). The assignee of an insolvent estate, who had a deposit as such in a bank of which he was cashier, drew a check, as assignee, for the amount of the deposit, and placed it on the spindle where paid checks were placed by the paying teller, and the check was entered in the bank's books. *Held*, that a disputable presumption of payment of the deposit arose. (*Wiggins v. Stevens*, 53 N. Y. S., 90; 33 App. Div., 83.)
- 16 (N. Y.). Where a check is deposited in a bank in the regular course of business, and is received and credited to the account of the depositor as money, the bank is liable in an action on contract for such indebtedness. Judgment, City Ct., N. Y., 1899, 58 N. Y. S., 1008; 28 Misc. Rep., 449, affirmed. (*Walton v. Riverside Bank*, 60 N. Y. S., 519; 29 Misc. Rep., 304.)
- 17 (Okla., 1900). Where a bank, in the due course of business, receives from a correspondent bank a check indorsed in blank, and in good faith parts with value or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check against the real owner, even though the check was not actually collected by such bank until after failure of the bank which transmitted the same to it. (*Winfield Nat. Bank v. McWilliams*, 2 Banking Cases, 277; 9 Okla., 493.)
- 18 (Tenn.). A regular customer of a bank sent to it a check with an unrestricted indorsement, and directed it to be placed to his credit. The check was received and credited and the customer so advised. On the day of receipt the bank sent the check to its correspondent for collection, paid a check drawn by the customer from a part of the proceeds of the credit, and closed its doors as insolvent. *Held*, That the check was not deposited for collection, but as cash for immediate use. (*Williams v. Cox*, Tenn. Sup., 37 S. W., 282; 97 Tenn., 555.)

## CHECKS—Continued.

## WHETHER CHECK ACCEPTED FOR PAYMENT OR COLLECTION—continued.

- 19 (Tenn., 1896). Where a bank accepts a check on another bank as cash, giving therefor a sum of money, a certificate of deposit, and the balance in a credit to the account of a third person, such transaction creates merely the relation of debtor and creditor between the bank and its customer, and the latter can not, on the insolvency of the bank, follow up the check, or its proceeds, as his property. (*Friberg v. Cox*, Tenn. Sup., 37 S. W., 283; 97 Tenn., 550.)
- 20 (Tenn., 1896). Where a check drawn on another bank is deposited in an insolvent bank without any special instructions, and it is not placed to the customer's credit, and immediately thereafter the receiving bank fails, and the check goes into the hands of the bank examiner and is afterwards collected, the proceeds are the property of the customer, and not of the bank. (*Showalter v. Cox*, Tenn. Sup., 37 S. W., 286; 97 Tenn., 547.)

## WHEN DEPOSIT INSUFFICIENT TO PAY CHECK.

- 1 (Ala., 1896). Where the funds are insufficient to pay a check in full the drawee is under no obligation to make a partial payment thereon. (*Lowenstein v. Bresler*, Ala., 19 So., 860; 109 Ala., 326.)
- 2 (Ill.). A bank is not obliged to make a partial payment on a check which is larger than the fund in the bank subject to check, but, if it pay part it may take up the check as evidence of its payment. (*Harrington v. First National Bank*, 85 Ill. App., 212.)
- 3 A bank is not bound to pay a part of a check when there is not enough to the depositor's credit to pay it in full.  
(Ill.) *Jacobson v. Bank of Commerce*, 66 Ill. App., 592;  
(Ill.) *Coates v. Preston*, 105 Ill., 470;  
(Mass.) *Dana v. Third National Bank*, 95 Mass., 445.
- 4 (Nebr., 1899). A bank will not be obligated to pay a check in a sum greater than the amount of the credit of the drawer in his account with the bank, nor does the check operate a transfer or an assignment of the lesser amount of the account. (*C. M. Henderson & Co. v. United States National Bank*, 2 Banking Cases, 85; 59 Nebr., 280.)
- 5 (Pa.). Where the payee of the check offers to take the amount to the credit of the drawer on the books of the bank which is less than the amount of the check, the bank should pay him said amount and indorse the payment on the check. (*Bromley v. Commercial National Bank*, 9 Phila., 522.)

## CHECK FOR ILLEGAL CONSIDERATION.

- 1 (Cal., 1892). A bank can not refuse to cash a check, although it knows that the check was drawn in payment of a bet made, in violation of a law, on the result of an election; and the fact that a check was so cashed is not ground on which the drawer can recover the amount from the bank. (*McCord v. California National Bank* (Cal.), 31 P., 51; 96 Cal., 197.)
- 2 (Maine, 1901). A statute of Maine provides that all notes or bills given for gambling debts are void against all except bona fide holders. Under this statute a check purchased by one knowing the same to have been given in payment for pool tickets is incollectible by him. (This is a decision of the supreme court of Michigan construing a Maine statute.) (*Maine Mile-Track Association v. Hammond*, 87 N. W. Rep., 135; 127 Mich., 690.)
- 3 (N. Dak., 1901). Both under elementary principles of the law of contracts and by the provisions of section 59 of chapter 100 of the Civil Code (Rev. Codes, 1899), the title of an indorser of a negotiable note is defective when the consideration for the indorsement is unlawful, or where the indorsement is procured by unlawful means. (*Drinkall v. Movious State Bank*, 88 N. W. Rep., 724; 4 Banking Cases, 222.)



## CHECKS—Continued.

## CHECK FOR ILLEGAL CONSIDERATION—continued.

- 4 (N. Dak., 1901). Under the statutes of this State gambling is expressly prohibited. It is accordingly held that the indorsement and delivery of a cashier's check by the payee to a gambler in payment for chips to be used in a gambling game does not make such a gambler a holder in due course, and his title so acquired is defective. (Ib.)
- 5 (N. Dak., 1901). The rule that courts of law and equity will leave the parties to prohibited transactions where their unlawful acts have placed them, so far as the same are executed, does not authorize an indorsee, who has procured the indorsement of a negotiable instrument in a gambling transaction, to rely on the indorsement so procured, either against the indorser or the maker of the instrument. Neither will prevent the payee of the instrument which has been so indorsed from enforcing payment against the maker, for the obvious reason that the contract which the latter enforces is not tainted with the unlawful transaction. (Ib.)
- 6 (N. Dak., 1901). The plaintiff in this action seeks to recover on a cashier's check issued to him by the defendant, which check he indorsed and delivered to a gambler in payment for chips to be used in playing a roulette wheel. The check was thereafter paid to the gambler by the defendant. We find there is substantial evidence in the record to sustain the finding of the jury that the defendant had notice of the defect in the gambler's title prior to making such payment, and therefore held that it was not error for the trial court to overrule defendant's motion for a new trial, based upon the insufficiency of the evidence as to notice. (Ib.)

## WHO NOT A BONA FIDE HOLDER FOR VALUE.

- 1 (U. S. Sup. Ct., 1893). A bank, knowing that the county treasurer of the county had not sufficient county funds in his hands to balance his official accounts, consented to give him a fictitious credit in order to enable him to impose upon the county commissioners, who were about to examine his accounts. They accordingly gave him a "cashier's check" for \$16,571.61, which he indorsed and took to the commissioners. They received it, but refused to discharge him or his bondsmen, and placed the check and such funds as he had in cash in a box and delivered them to his bondsmen. The latter deposited the money and the check in another bank in the same place, which bank brought suit against the bank which issued the check to recover upon it. *Held*, 1, that the circumstances under which the check was issued were a plain fraud upon the law, and also upon the county commissioners; 2, that their receipt of it and turning it over to the sureties was a single act, intended to assist the sureties in protecting themselves, and was inconsistent with the idea of releasing them from their obligations; 3, that the question whether the evidence did or did not establish the fact that the county was an innocent holder should have been submitted to the jury. (*Thompson v. Sioux Falls National Bank*, 150 U. S., 231.)
- 2 (Ala., 1894). The crediting by a bank of the amount of a check to the account of a depositor indebted to it does not make the bank a bona fide holder for value of the check. (*First National Bank v. Nelson* (Ala.), 16 So., 707; 105 Ala., 180, 1894.)
- 3 (Ill.). Title to a check payable to H. B., intended for N. B., can not be obtained under indorsement by H. B., made fraudulently, though the indorsee be deceived and pay value. (*Sioux Valley State Bank v. Drovers' National Bank*, 58 Ill. App., 395.)
- 4 (Ind. T., 1896). Plaintiff accepted in good faith a check in which the indorsement of the payee's name was a forgery, and after indorsing the same delivered it to defendant bank for collection. Defendant collected the check and paid the money to plaintiff, but on subsequently discovering the forgery paid back such amount to the bank on which the check was drawn without notifying plaintiff of the forgery or

## CHECKS—Continued.

## WHO NOT A BONA FIDE HOLDER FOR VALUE—continued. 1

that it had paid back the sum collected. *Held*, that any fund belonging to plaintiff subsequently coming into possession of defendant could be legally applied to the reimbursement of the latter for the amount advanced on the check, plaintiff being chargeable with notice of the forgery. (*Green v. Purcell National Bank*, 37 S. W., 50; Ind. T., 270.)

- 5 (Mich., 1896). Where a bank discounts a draft in advance of its acceptance, it is not a bona fide holder for value unless it has funds in its hands which it releases or fails to withhold from the drawer because of the acceptance. (*First National Bank v. Wills Creek Coal Co.* (Mich.), 68 N. W., 232; 110 Mich., 447.)
- 6 (Mich. Sup., 1903). Where commercial paper is tainted with fraud, the burden is on the holder to show that he acquired it in good faith. (*Glines v. State Savings Bank*, 5 B. C., 568; 94 N. W. Rep., 195.)

## OVERDRAFTS.

- 1 (U. S. C. C. A., 1904). An overdraft allowed by a bank is a loan due on demand, and hence, where a demand note is given therefor, a suit may be maintained thereon to the same extent as could have been maintained on the overdraft thereby segregated from the account. (*Hennessy Bros. & Evans Co. v. Memphis National Bank*, 129 Fed. Rep., 557.)
- 2 (U. S. C. C. A., 1904). A building corporation opened an office in a city in a foreign state, where it was conducting large building operations, and placed the same in charge of its assistant secretary, who opened a bank account in defendant's bank in the name of the corporation through which the latter's financial transactions at that place were accomplished. The account becoming overdrawn, such officer executed demand notes in the name of the corporation to the bank therefor, whereupon the amounts were credited in the corporation's bank-book, and the book was delivered to the officer, whose accounts were periodically checked up by the corporation, and no objections to the accounts were made. *Held*, that the corporation was liable on the notes, though no express authority to the officer executing them to do so was shown, and he subsequently became a defaulter to the corporation for a large sum. (*Ib.*)
3. The state of a depositor's account is its true condition and not the condition shown by its books, and the bank is justified in refusing to pay a check that would create an overdraft.  
(Ill.) *American Exchange Bank v. Gregg*, 138 Ill., 596;  
(Mass.) *Merchants' National Bank v. National Bank of Commerce*, 139 Mass., 513.
- 4 (Me.). A bank may maintain an action against the drawer who has received moneys from it on overdrawn checks. (*Franklin Bank v. Byram*, 39 Me., 489; 63 Am. Dec., 643.)
- 5 (Mass., 1885). A bank may recover from another bank the amount of an overdraft of one of its depositors paid by mistake to such latter bank through the clearing house. (*Merchants' National Bank v. National Bank of Commerce*, 139 Mass., 513.)
- 6 (Nebr.). Where a depositor has overdrawn his account and subsequently makes a deposit, in the absence of evidence to the contrary it will be presumed that the deposit was made in payment of the overdraft. (*Nichols v. State*, 46 Nebr., 715.)
- 7 (N. Y.). Where money has been fraudulently obtained by means of an overdraft the title remains in the bank which may follow and reclaim it in the hands of anyone not an innocent holder who has taken it and allowed an equivalent therefor. (*Tradesmen's National Bank v. Merritt*, 1 Paige, 302.)
- 8 (Pa.). The payment of overdrafts has no authority in sound usage or in law. (*Lancaster Bank v. Woodward*, 18 Pa., 357.)

## CHECKS—Continued.

## OVERDRAFTS—continued.

*Interest on overdrafts.*

- 9 (U. S. C. C. A., 1904). Where an overdraft was settled by the execution of a note payable on demand, the amount due bore interest from the date of the settlement. (*Hennessy Bros. & Evans Co. v. Memphis National Bank*, 129 Fed. Rep., 557.)
- 10 (Ill., 1889). A bank is not entitled to interest on overdrafts except by express agreement. (*Owens v. Stapp*, 32 Ill. App., 653.)
- 11 (Ill., 1866). If a bank presents an account to a depositor who has overdrafted, it amounts to a demand for payment and interest may be recovered from that date. (*Casey v. Carver*, 42 Ill., 225.)

## LOST OR STOLEN CHECKS.

- 1 (Conn.). A corporation receiving a check in payment of an account indorsed it to the bank, filled out a deposit slip, and placing both check and slip in a sealed envelope delivered them to a messenger known to be untrustworthy to take to the bank. The messenger opened the envelope, destroyed the deposit slip and told the cashier that he had been directed to draw the cash on the check. The cashier paid him and the messenger absconded. *Held*, that the bank was liable, the corporation having never before drawn funds on a check of a third party; hence this was not in the usual course of business. (*Bristol Knife Co. v. First National Bank*, 41 Conn., 421.)
- 2 (Ind.). It was the custom of a grain dealer, doing business at a place by an agent, to furnish the agent with checks on the bank, signed in blank, to be also signed by the agent when used in payment for grain. Such a check, after being signed in blank by both principal and agent, was stolen and filled out by a third person, and was presented to and paid by the bank. *Held*, that, as between the customer and the bank, the customer was liable for the loss. (*Snodgrass v. Sweetser* (Ind. App.), 44 N. E., 648; 15 Ind. App., 682.)
- 3 (Mass.). A firm made out checks payable to the order of several parties for the payment of debts owing to each. The checks, together with the accounts to be paid by them were placed in envelopes, sealed, and handed to a clerk of the firm for mailing. The clerk opened the letters, changed the words "or order" to "or bearer," and obtained the money. *Held*, that the bank was liable, as the circumstances did not show any negligence on the part of the depositor. (*Belknap v. National Bank*, 100 Mass., 376.)
- 4 (Ohio). A depositor drew a check payable to himself without adding the words "or order" or "or bearer" and indorsed it in blank. The check was lost and was paid to the finder on presentation. *Held*, that the check was negotiable and that the bank was not liable to the drawer. (*Bowden v. Third National Bank* (Common Pleas), 7 Weekly Law Bulletin, 283; District Court, 12 Weekly Law Bulletin, 184.)

*Stolen check, value of instructions.*

- 5 (Ind., 1894). Where the larceny of a bank check is charged, the question of its value is for the jury, and it is error to instruct them that a check drawn on a bank where the maker has funds sufficient to meet it is presumptively of some value. (*Burrows v. State*, 37 N. E., 271; 137 Ind., 474.)

## MISCELLANEOUS.

*Authority to sign checks.*

- 1 (Ala., 1901). In an action by a married woman against a bank for money had and received, the following facts were disclosed: A check was drawn payable to the order of the plaintiff and delivered to her husband. The husband presented the check at the defendant bank unindorsed by the payee. Upon his attention being called to this fact, the husband, pretending to have authority to indorse the paper

## CHECKS—Continued.

## MISCELLANEOUS—continued.

for and in the name of his wife, wrote on the back of the check his wife's name, per himself. Thereupon the defendant bank cashed the check and put the money to the credit of the husband. Subsequently the money so put to his credit was drawn out by the husband and used in the payment of his own debts and for other purposes of his own. The husband was without authority to indorse the check for and in the name of his wife. The check was given by the lender of the money to the wife, and the money collected on it was the proceeds of a loan which was secured by a mortgage upon the wife's property, which mortgage was duly executed by her. The purpose of the wife in obtaining the loan was to raise money to pay off her husband's debt and enable him to carry on his business, and she knew that her husband had gotten the money on the loan for such purpose. *Held*, that the wife can not maintain an action against the bank for money had and received. (First Nat. Bank of Gadsden v. Moragne, 30 So. Rept., 628; 128 Ala., 157.)

- 2 (Ky., 1902). In an action against a bank to recover a deposit in which plaintiff by reply denied that a check for the amount sued for, which defendant had paid, was signed by her, or by her authority, it was error to instruct the jury that, in order to find for the defendant, it must believe that the check was signed by plaintiff, but the court should, as requested by defendant, have instructed the jury to find for defendant if it believed that the check was signed by plaintiff, "or by another for her and with her consent, or by her authority." (Phoenix Nat. Bank v. Taylor, 67 S. W. Rep., 27; 4 Banking Cases, 366.)
- 3 (Tex., 1901). Revised statutes (Texas), 1895, article 2967, provides that during the marriage the husband shall have sole management of the wife's separate estate. A husband deposited his wife's money in a bank in her name, and stated that it would be checked out by him. *Held*, that the bank was authorized to cash checks which were presented by the husband and signed with the wife's name by the husband as agent. (Coleman v. First Nat. Bank of Waxahachie, 63 S. W. Rep., 867; 3 Banking Cases, 643; 94 Tex., 605.)
- 4 (Tex., 1901). The fact that to the bank's knowledge the husband was a drunkard, and improvident in the use of money, did not impose on the bank the duty of seeing that the money was drawn out for the wife's use. (Ib.)

*Bank must know that indorsement is genuine.*

- 5 (Iowa, 1897). It is the duty of a bank to which a check drawn by a depositor, and payable to order, is presented by one claiming under an ostensible indorsement by the payee, to learn at its peril that the indorsement is genuine. (German Sav. Bank v. Citizens' Nat. Bank, Iowa, 70 N. W., 769; 101 Iowa, 530.)

*When bank not liable if money is misappropriated.*

- 6 (U. S. C. C., 1895). A bank cashier or teller may pay out a check drawn in the name of a corporation in the usual course of business and when there are no circumstances of suspicion to put him on inquiry, without any investigation as to the destination of the money drawn; and the bank is not to be held liable if the money is misappropriated. (Hatch v. Johnson Loan and Trust Co., 79 Fed Rep., 828.)

*When bank bound by agreement to cash future checks.*

- 7 (Iowa, 1898). Plaintiff testified that he inquired by telephone whether thereafter checks drawn by S., a live-stock buyer, would be paid, and the response was: "It will be all O. K. to cash checks from S. to the amount of stock he gets." Defendant testified that this response was to an inquiry as to specific checks. *Held*, that the jury was warranted in finding that it referred to future checks. (Leach v. Hill, 76 N. W., 667; 106 Iowa, 171.)

## CHECKS—Continued.

## MISCELLANEOUS—continued.

*Protest of checks.*

- 8 (Nebr.). The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser. (*Wood River Bank v. First National Bank of Omaha*, 55 N. W., 239; 36 Nebr., 744.)
- 9 (Nebr.). Bank checks in the country are regarded as inland bills of exchange, for the purpose of presentment and demand and notice of dishonor, and do not require a formal protest in order to charge the indorsers. (Ib.)
- 10 (Nebr.). They are also due upon presentation and not entitled to days of grace. (Ib.)

*Presumptions as to names in check.*

- 11 (N. Y. Sup.). In the absence of proof to the contrary, it will be presumed that the name of the payee appearing in a check was written in when the check was signed. (*Fifth National Bank v. Central National Bank*, 31 N. Y. S., 541.)

*Checks, how applied against depositor's account.*

- 12 (N. Y. Sup.). Where a person deposits in bank money held by him in a fiduciary capacity, mixing it with his own moneys, and afterwards draws checks against his account, such checks will be applied first to the moneys belonging to the drawer; and in such case the rule that checks will be applied to the deposits in the order in which the deposits were made does not apply. (*Heidelberg v. National Park Bank*, 33 N. Y. S., 794.)

*Liability of bank when deposit is a trust fund.*

- 13 (Nebr., 1897). Where officers of a corporation borrow money to be deposited in a bank as a trust fund for its creditors, but such intention and the insolvent condition of the corporation are not known to the bank, its payment in good faith of such fund on the check of an officer of the corporation does not render it liable as a trustee to the other creditors of the corporation because the proceeds of the check, with the consent of the bank, were used to take up the note on the faith of which the loan had originally been made by the bank. (*Wyman v. Nat. Bank of Commerce*, 71 N. W., 277; 51 Nebr., 636.)

*Notice to payee of dishonor of check.*

- 14 (Mo.). Where the payee of a check mails it to the drawee bank, it is the duty of the bank to give the payee notice of dishonor, if the drawer has no funds on deposit from which payment can be made. (*Ripley National Bank v. Latimer*, 2 Mo. App. Rep'r, 967.)

*Bank check as a tender.*

- 15 (N. Y.). A check, unless objected to, is a sufficient tender. (*Wright v. Robinson et al.*, 32 N. Y. S., 463.)
- 16 (Wash., 1895). A tender of bank checks payable in sixty and ninety days is not a tender of payment. (*Cady v. Case*, 39 P., 375; 11 Wash., 124.)

*Character of indorsement not shown by its place on back of draft.*

- 17 (Tex., 1895). A draft was drawn payable to the order of the drawer, and by it indorsed specially to the defendant corporation, and by defendant indorsed in blank, and cashed by the plaintiff bank for another corporation, whose indorsement was written above the indorsement of the defendant. *Held*, that the position of the indorsements was not notice to plaintiff that defendant was an accommodation indorser. (*Marshall National Bank v. O'Neal*, 34 S. W., 344; 11 Tex. Civ. App., 640.)

*Collection of checks, conversion, demand.*

- 18 (N. Y. App.). Where the payee of a check deposited the same with a bank for collection, and said bank sent it for collection to defendant, and

## CHECKS—Continued.

## MISCELLANEOUS—continued.

defendant received from the bank upon which the check was drawn a draft in payment thereof, defendant is not liable to the payee for the conversion of said draft, in the absence of a demand therefor, and neither a telegram sent to defendant by the drawer of the check, instructing defendant to hold the draft, nor an inquiry by the bank upon which the check was drawn as to whether defendant could hold the draft, is a sufficient demand on behalf of said payee. (26 N. Y. S., 1035, affirmed; *Castle v. Corn Exch. Bank*, 42 N. E., 518; 148 N. Y., 122.)

*Liability of indorser of check.*

- 19 (Ala., 1894). The payee of a forged check, who indorses it and receives full value therefor, guarantees its genuineness; and as to him, the indorsee is under no obligation to discover that it is forged, and may recover back the money so paid. (*Birmingham National Bank v. Bradley* (Ala.), 15 So., 440; 103 Ala., 109.)

*Negligence of bank in payment of check.*

- 20 (S. C., 1899). In an action by a bank to compel defendant to make good overdrafts by the latter's agent to break the force and effect of its dealings with the bank during eight years, defendant offered testimony to prove directions to its agents which were never communicated to the bank or to any other person than such agent, and alleged to have been communicated through a person who did not appear to have had any relation to defendant making him a proper instrument for the purpose. *Held*, that the testimony was inadmissible. (*Merchants and Planters' Nat. Bank v. Clifton Mfg. Co.*, 2 Banking Cases, 128.)

*Correction by bank of mistake in payment.*

- 21 (Ill. App.). If a customer of a bank hands the receiving teller a check drawn by another person upon the same bank, and at the same time hands him his pass book, and the teller receives the check and enters a credit for the amount in the pass book, but no entry is made on the books of the bank, and nothing else is said or done, and the drawer has no funds in the bank, the check may be returned to the depositor and the credit in the pass book canceled. (*Jacobson v. Bank of Commerce*, 66 Ill. App., 470.)
- 22 (Ill. App.). In such case a finding by the court that the check was received as a cash deposit is erroneous. (Ib.)
- 23 (Ind.). The fact that the cashier of a bank upon which a check is drawn takes the check and places it upon the "canceling fork" does not constitute such an acceptance as will prevent him from declining to pay and returning the same upon learning that the drawer has not sufficient funds, or if the check is not in proper form. (*The National Bank of Rockville v. The Second National Bank of Lafayette*, 69 Ind., 479.)
- 24 (Tenn., 1897). A check was forwarded to the bank on which it was drawn for collection. When received by the bank the maker's account was overdrawn. The cashier directed his assistant to refuse payment, but, through mistake, he stamped it paid and mailed a remittance, which action was revoked by the cashier and the remittance recovered from the post-office and the check protested. The account at the bank was not charged with the check. *Held*, that the bank was not liable. (*Carley v. Potter's Bank*, 46 S. W., 328.)

*When failure to pay check not an act of insolvency.*

- 25 (U. S. Sup. Ct., 1899). For a number of years there had been mutual and extensive dealings between the defendant bank and the "C." bank, in which each was acting for the other as correspondent banks for the making of collections and the auditing of the proceeds thereof, and transmitting accounts of the same, including costs of protest and other expenses, and the "C." bank also kept an active deposit

## CHECKS—Continued.

## MISCELLANEOUS—continued.

account with the defendant bank, and settlements on the basis of such accounts were made at periodic times during all such period, and any balance, mutually agreed to be charged or credited, was at such times credited or debited, as the fact might be, upon the books of each of the banks, to a new account, and the prior accounts thereby and in that manner adjusted and settled. *Held*, That a refusal on the part of the defendant bank to pay a check drawn on it by the "C." bank did not constitute an act of insolvency on the part of the "C." bank. (*McDonald v. Chemical Nat. Bank*, 1 Banking Cases, 657; 174 U. S., 610.)

*Check; gift causa mortis.*

26 (Cal., 1901). Defendant firm had been acting as banker for plaintiff's testator for fourteen years, and K., a member of the firm, had been an intimate friend of testator. Testator wrote K. on the 13th day of January that he was sick, and requested K. to call, which he did; and he continued to visit testator until he died, on the 21st of January. K. testified that on the 14th of January testator requested K. to call a lawyer, as he wished to leave something to K., and that he insisted thereon, and that K. then attempted to get attorneys, but failed, and on the 15th testator told him to draw a check for the amount of testator's deposit, and that he would give it to the children of K., and the latter drew a check for \$25,000 of such deposit, and testator signed it, and K. had the money transferred to his account. The testator was of sound mind, left no relatives in this country, and was worth \$102,000, and devised all his property to his brother, a colonel in the French army. *Held*, sufficient to sustain a judgment for defendant in an action by testator's executors to recover the amount of the check from the firm. (*Frantz et al. v. Porter et al.* (S. F. 1, 741), 64 Pac. Rep., 92; 132 Cal., 49. See note at end of case.)

27 (Cal., 1901). Where a party delivers a negotiable check on a bank to another, though he thereafter requests that it be not presented for payment until after his death, the payee gains such possession and control of the thing as constitutes a completed and perfected gift. (*Pullen et al. v. Placer County Bank*, 4 Banking Cases, 220; 138 Cal., 169; 66 Pac. Rep., 740.)

*Ownership of draft.*

28 (Mich., 1902). The disclosure of a garnishee stated that defendant in the principal action gave him a check payable to, and indorsed in blank by, a third party, and requested him to see if it was good; that he inclosed it in a letter to the bank, and thereafter received a draft from the bank, payable to defendant, which draft was in his possession when the garnishee process was served on him, but was afterwards returned by him to the bank. *Held*, that in the absence of any evidence to show that the check did not belong to defendant, a judgment against the garnishee was proper. (*Weaver v. Irons*, 88 N. W. Rep., 873; 4 Banking Cases, 170; 129 Mich., 368.)

*Holders of draft not bound by acts of indorsers after transfer.*

29. The holders of a draft before maturity are not bound by the acts of indorsers after the transfer.

(La., 1894.) *Block v. Creditors*, 16 So., 267; 46 La. Ann., 1334; *St. Louis National Bank v. Bloch*;

(N. Y.) *Castle v. Corn Exchange Bank*, N. Y. App., 42 N. E., 518.

*Effect of custom in transfer of check.*

30 (Ala., 1894). Evidence of a custom of passing checks payable to a person "or bearer" by delivery only does not affect the operation of the Code, section 1761, requiring such checks to be construed as payable to a person "or order." (*First National Bank v. Nelson*, 16 So., 707; 105 Ala., 180.)

## CHECKS—Continued.

## CERTIFICATION OF CHECKS.

## RIGHT TO CERTIFY.

*National banks may certify checks.*

- 1 (U. S. Sup. Ct., 1870). National banks have the power to certify checks, and this power may be exercised by the cashier without special authorization. The directors may limit his exercise of this power as they deem proper, but such limitation will not affect a person ignorant thereof who deals with the cashier in relation to matters apparently within the scope of his power. (*Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall., 604; 1 N. B. C., 47.)

*When cashier may not certify his own check.*

- 2 (U. S. C. C. A., 1900). The certification by the cashier of a national bank of his individual check, given and received for his individual benefit, with no authority either to certify it or to make it payable elsewhere than at the office of his bank, is not binding on the bank. (*Gale v. Chase Nat. Bank*, 104 Fed. Rep., 214.)

## WHAT NOT A CERTIFICATION.

- 1 (U. S. C. C., 1898). A promise by a bank to pay any checks that may be drawn upon it by a certain person is not a certification of such checks, but a guaranty. (*Bowen v. Needles Nat. Bank*, 87 Fed. Rep., 430.)

## ORAL ACCEPTANCE.

- 1 (Ill.). Proof that a bank had paid a check to an unauthorized indorsee, and had charged it to the account of the drawee, who at the time of such payment had enough funds on deposit to meet it, constitutes sufficient proof of an acceptance of the check by the bank and renders it liable to the payee for the amount thereof. (*Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App., 166.)
- 2 (Iowa, 1898). An oral acceptance of a check is valid when the drawee knows that the drawer is acting for another, and he has funds of the other sufficient to pay it. (*Leach v. Hill*, 76 N. W., 667; 106 Iowa, 171.)
- 3 (W. Va., 1874). The act of Congress of March 3, 1869 (Rev. Stat., sec. 5208), making it unlawful for national banks to certify checks unless the drawer has at the time an amount of funds on deposit equal to the amount specified in the check, does not invalidate an oral acceptance of a check or promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. (*First Nat. Bank v. Merchants' Nat. Bank*, 7 West Virginia, 544; 1 N. B. C., 915.)
- 4 (W. Va.). A check drawn on a national bank was presented for acceptance, whereupon the bank promised to pay it as soon as it received information that a certain draft left with it for collection was paid. The draft was paid and the bank informed. *Held*, that the acceptance was good and binding on the bank. (*Ib.*)

## AUTHORITY OF OFFICERS TO CERTIFY CHECKS.

- 1 (N. Y.). The president may certify a check. (*Clafin v. Farmers' Bank*, 25 N. Y., 293.)
- 2 (U. S. Sup. Ct.). Cashier may certify check. (*Merchants' National Bank v. State National Bank*, 77 U. S., 604.)
- 3 (N. Y.). Where a check was certified by a teller the latter's authority may be inferred from previous transactions and acts of the same kind. (*Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 28 N. Y., 425.)



## CHECKS—Continued.

## AUTHORITY OF OFFICERS TO CERTIFY CHECKS—continued.

- 4 (N. Y.). A cashier may certify checks under his general authority, but he can not certify a check until after the day it is made payable. (*Clarke National Bank v. Albion Bank*, 52 Barb., 592.)
- 5 (N. Y.). Parties dealing with a bank are not bound by any restrictions on the power of the cashier to certify checks unless said restriction is known to them. (*Clarke National Bank v. Albion Bank*, 52 Barb., 592.)

## NATURE AND EFFECT OF CERTIFICATION.

- 1 (U. S. Sup. Ct., 1870). If a check is certified at the request of the payee, so much of the depositor's account as corresponds to the certified check is at once withdrawn from the depositor's account and becomes the property of the bank. (*Merchants' National Bank of Boston v. State Bank*, 10 Wall., 604.)
2. The certification of a check by a bank at the request of the payee releases the drawer and substitutes the bank as the debtor.  
(Ill.) *Drovers' National Bank v. Packing Co.*, 117 Ill., 100;  
(N. Y.) *Irving Bank v. Wetherwald*, 36 N. Y., 335;
- 3 (N. Y.). The certification of a check at the request of the drawer may be revoked for mistake as to the drawer's account unless it has passed to a bona fide holder or the payee has parted with value and suffered a detriment on the faith of the certification.  
*Lynch v. First National Bank*, 107 N. Y., 179;  
*Goshen National Bank v. Bingham*, 118 N. Y., 349.
- 4 (U. S. Sup. Ct., 1870). A certificate of a bank that a check is good is equivalent to an acceptance; it implies that a check is drawn upon sufficient funds in the hands of the drawee; that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. (*Merchants' National Bank v. State National Bank*, 10 Wall., 604; 1 N. B. C., 47.)
- 5 (Ala.). A certified check has a distinctive character as a species of commercial paper, the certification constituting a new contract between the holder and the certifying bank. The funds of the drawer are, in legal contemplation, withdrawn from his credit and appropriated to the payment of the check, and the bank becomes the debtor of the holder as for money had and received. (*National Commercial Bank v. Miller & Co.*, 77 Ala., 168.)
- 6 (Ala.). Where the defendant has a right of election, on account of a tort committed, either to sue for the tort, or, waiving the tort, to sue for money had and received, the relation of debtor and creditor does not exist until he elects to sue for the money; and his creditors can not defeat his election by garnishment against the wrongdoer. But this principle does not apply where the garnishees, having received a check from the defendant, with authority to collect for deposit and use, have had the check certified by the bank on which it is drawn, before the service of the garnishment; being authorized to have it certified, and the relation of the parties being thereby changed, they are liable to the defendant for the amount of the check as for money had and received, and that liability may be reached by garnishment. (Ib.)
- 7 (Ill.). The receipt of a certified check is not, of itself, payment. Such a check does not cease to be commercial paper and become money. Certifying a check to be "good" is nothing more than a promise by the bank upon which it is drawn to pay it when presented, as in the case of the acceptance of the bill of exchange. If an accepted bill be protested for nonpayment, and the drawer duly notified thereof, he is bound to pay the bill, with damages and costs. The same is the law with regard to a certified check. (*Bickford v. First National Bank of Chicago*, 42 Ill., 238.)

## CHECKS—Continued.

## NATURE AND EFFECT OF CERTIFICATION—continued.

- 8 (Ill.). As the acceptance of a bill of exchange does not discharge the drawer, so neither should the acceptance of a check, manifested by the word "good" placed upon it by the bank, discharge the drawer. They rest on the same principles. In this respect there is no difference between an uncertified and a certified check; the dishonor of either must make the drawer liable. (Ib.)
- 9 (Ill.). There is this difference, however, between a certified and an uncertified check: In case of the former, the amount of the check is supposed to be at once charged up against the drawer, and thus placed beyond his control, while the holder of an uncertified check may be anticipated by another, who also holds a check on which he may draw the money. The certificate is an unconditional promise on the part of the bank to pay the check on demand. The object in certifying the check is to give it a currency value and to enable the holder to use it as money. (Ib.)
- 10 (Ill.). Although it be the fact that certified checks pass from hand to hand as cash, still they are not cash or currency, in the legal sense of those terms, and they do not lose, on that account, any of their characteristics as bills of exchange, and, therefore, when dishonored, the holder has a right to look to the drawer for payment. (Ib.)
- 11 (Ill.). In this case a check was drawn and certified and deposited in a bank after 10 o'clock a. m. and before 3 o'clock p. m. on a certain day, where it remained until the next morning, when it was taken, in the usual course of business, to the bank on which it was drawn. The bank was closed and continued so. The check was protested for nonpayment and due notice given. This was sufficient diligence to hold the drawer. (Ib.)
- 12 (Ill.). The holder of a certified check has the right to hold the drawee and acceptor as well as the drawer. So, where the acceptor has failed and made an assignment, the holder waives none of his rights against the drawer by giving notice to the assignee of the acceptor not to pay over any money to the drawer out of assets which might come to his hands in that capacity. (Ib.)
- 13 (Ill.). Where a check is certified by the bank on which it is drawn, such certification constitutes a contract between the holder of the check and the bank, and so much of the money of the drawer as is required for its payment is in law appropriated and set apart for its payment, and hence the drawer of the check has no longer the right to check out such money, as his interest in it has terminated. (Wright v. MacCarty, 92 Ill. App., 120.)
- 14 (Ill. Sup., 1902). Where a bank certifies a check it thereby enters into an absolute undertaking to pay it when presented at any time within the time fixed by the statute of limitations, and is therefore estopped to deny that it possessed sufficient funds of the drawer to pay the same. (Jackson Paper Mfg. Co. v. Commercial Natl. Bank, 5 B. C., 33; 65 N. E. Rep., 136.)
- 15 (N. Y.). The certification of a check by a bank is, in effect, merely an acceptance, and creates no trust in favor of the holder of the check and gives no lien on any particular portion of the assets of the bank. (People v. St. Nicholas Bank, 28 N. Y. St., 427; 58 N. Y. St., 712.)
- 16 (Pa. Sup., 1903). Where a check drawn by a depositor is certified, in the absence of fraud the amount is as much withdrawn from the depositor's credit as if the money had been paid. (Central Guarantee Trust and Safe Deposit Co. v. White et al., 5 B. C., 600; 56 Atl. Rep., 76.)

*When certified check in excess of deposit valid against bank.*

- 17 (U. S. Sup. Ct., 1892). A broker received coupon railroad mortgage bonds to cover future margins of a customer and pledged them to a bank as collateral security for any indebtedness he might owe it. Afterwards the bank advanced money and certified checks on the faith of these bonds, when broker did not have money on deposit equal in amount

## CHECKS—Continued.

## NATURE AND EFFECT OF CERTIFICATION—continued.

to the checks. *Held*, under section 5208, that although the certifications were unlawful the checks certified were good and valid obligations against the bank. (*Thompson v. St. Nicholas National Bank*, 146 U. S., 240.)

- 18 (N. Y.). Where a bank erroneously certified a check drawn by one of its depositors for rents collected by him for his employer when the depositor has not sufficient funds to meet the same, the mere fact that the employer would have discharged the depositor if the check had not been certified, and prevented the collection of further rents by him, whereby further loss might have been prevented, is not sufficient as an element of damages to render the bank liable to the employer on the certification for more than the amount of the depositor's funds in its hands when the certification was made. (*Rankin v. Colonial Bank*, 64 N. Y. S., 32; 31 Misc. Rep., 227.)

## CHECK ALTERED AFTER CERTIFICATION.

- 1 (La.). Where a bank certified a check without drawing a line with a pen through the blank space following the amount it was held that the bank was negligent and was liable to an innocent holder for the amount of the check as fraudulently altered. (*Helwege v. Hibernia National Bank*, 28 La. Ann., 520.)
- 2 (N. Y.). Where a bank paid to a bona fide holder a certified check which after certification had been fraudulently altered by raising the amount, it can recover back the sum thus paid unless such bona fide holder has suffered loss in consequence of the mistake. (*National Bank of Commerce in New York v. National Mechanics' Banking Association*, 55 N. Y., 211.)

## NEGLECTENCE IN CERTIFYING A RAISED DRAFT—LIABILITY.

- 1 (N. Y. App., 1903). A bank negligently certified a raised draft, which was thereupon deposited with another bank, which, relying on the negligent acts of the former bank in certifying, accepting, and paying the draft, parted with the moneys on the demand of its depositor. *Held*, that the first bank could not thereafter recover back as moneys paid by mistake. Its liability rests on the estoppel arising from its subsequent acts and its negligence until it was too late to protect the bank with which the draft was deposited or itself from loss, and not on the mere certification. (*Continental Nat. Bank of New York v. Tradesmen's National Bank of New York*, 5 B. C., 242; 66 N. E., 1108.)

## CANCELING CERTIFIED CHECK AT REQUEST OF DRAWER.

- 1 (Ill.). The possession of a check (whether certified or not) by the drawer raises the presumption that it has not been delivered to the payee, and the banker on whom said check is drawn has a right to cancel it on the application of the drawer. (*Buehler v. Galt*, 35 Ill. App., 225.)
- 2 (N. Y.). Where a check has been certified at the request of the payee, the bank was bound by contract to pay it, although the drawer after the certification had notified it not to do so. (*Freund v. Importers and Traders' National Bank*, 76 N. Y., 352.)

## BONA FIDE HOLDER OF ILLEGALLY CERTIFIED CHECK.

*Bona fide holder of check illegally certified may collect.*

- 1 (U. S. C. C., 1898). A bank certifying a check without funds is not liable except to a bona fide holder. (*Bowen v. Needles National Bank*, 87 Fed. Rep., 430.)
- 2 (N. Y.). In an action by a bona fide holder of a check drawn on defendant, a national bank, and certified by its cashier, *held*, that the de-

## CHECKS—Continued.

## BONA FIDE HOLDER OF ILLEGALLY CERTIFIED CHECK—continued.

pendant was liable although the drawer had no funds in the bank when the check was certified. (*Cooke v. The State National Bank of Boston*, 52 N. Y., 96; 1 N. B. C., 698.)

*Who not a bona fide holder.*

- 3 (N. Y.). Where a postdated check is certified by the cashier of the bank on which it is drawn to be "good," by indorsement thereon before the day of its date, the instrument, upon its very face, communicates facts and information to persons receiving the same that the cashier, in making such certification, was not acting within the known limits of his power, and that he was clearly exceeding them. (*Clarke National Bank v. The Bank of Albion*, impleaded, etc., 52 Barb., 592.)
- 4 (N. Y.). It appearing on the face of such paper that it was certified by the cashier before its payment could have been legally demanded and before it could be presumed that the drawer had made a deposit for its payment, this is, in the law, full notice to a purchaser. (Ib.)
- 5 (N. Y.). To enable a holder of such check to recover of the bank upon it, it must appear that he became the owner and holder in good faith for a full and fair consideration in the usual course of business, and without notice of the cashier's want of power to make the certification. He must have parted with something of value upon the strength and in consideration of the transfer of the paper. (Ib.)
- 6 (N. Y.). If he parted with nothing before the check was dishonored, he stands in privity with his immediate indorsers, and is affected by all that will affect them. (Ib.)
- 7 (N. Y.). Crediting the indorsers with the avails of the check on the books of the holder is in no sense a paying over. The holder upon receiving notice of dishonor, has an undoubted right to erase such credit, and to restore it only at the special instance of the indorsers from whom he received the check. (Ib.)

## DRAWER, WHEN RELEASED BY CERTIFICATION, RIGHTS OF INDORSER.

- 1 (Ind.). As a general rule the certification of a check in the hands of the payee, the body of which is unaltered, releases the drawer from further liability and creates a direct liability from the bank to the payee, while as between the bank and the drawer it operates as a payment to that extent on his account; and although prior to its being certified the check may be countermanded by the drawer, after its certification it has passed beyond his control and he no longer has power to countermand its payment. (*Meridian National Bank of Indianapolis v. First National Bank of Shelbyville*, 34 N. E., 608; 7 Ind. App., 322.)
- 2 (Ind.). The indorsement of a check by the person to whom it was actually issued and by whom the drawer intended the money should be received, is an effectual indorsement to pass title to the check to a bank cashing the same; and the indorsement is not, as to such bank, invalidated by reason of the payee acting under an assumed and fictitious name when he was not impersonating any other individual. (Ib.)
- 3 (Ind.). A bank cashing in good faith a check so drawn and indorsed, may collect the amount thereof of the bank which has certified the same. (Ib.)

*Drawer, when not released by certification.*

- 4 (Mass.). Though the drawer of a check, before delivering it, has it certified, he will not be relieved from liability thereon, the bank having failed before payment thereof, though presented in due season. (*Randolph National Bank v. Hornblower et al.*, 35 N. E., 850; 160 Mass., 401.)
- 5 (Ohio, 1894). Where the drawer of a check, before delivering it to the payee, has it certified as good by the bank upon which it is drawn, and

## CHECKS—Continued.

## DRAWER, WHEN RELEASED BY CERTIFICATION, RIGHTS OF INDORSER—continued.

the payee presents it in good season for payment, and gives due notice to the drawer of its nonpayment, and the bank had failed at the time of presentment for payment, the drawer will not be discharged from liability on the check. *-(Cincinnati Oyster and Fish Co. v. National Lafayette Bank, 36 N. E., 833; 51 Ohio St., 106.)*

## MISCELLANEOUS.

*Genuineness of indorsement not warranted by certification.*

- 1 (Ill., 1894). The acceptance or certification of a bank check does not warrant the signatures of the indorsers to be genuine. *(First National Bank of Chicago v. Northwestern National Bank of Chicago, 38 N. E., 739; 152 Ill., 296.)*

*When mistake in certification may be corrected.*

- 2 (Ill.). In case a bank has, through mistake, certified a check for an amount greater than the drawer has on deposit, it may, after discovering the mistake and after the check has been delivered by the bank with certification to the holder, upon again getting temporary possession of it, cancel and make the certification of no effect as between the holder and the bank, provided no rights of other parties have intervened, and the situation or rights of the holder, between the certification of the check and its cancellation, has in no way changed. *(Dillway v. Northwestern Nat. Bank, 82 Ill. App., 71.)*

*Mistake in certification, bank's rights against drawer.*

- 3 (N. Y.). Plaintiff, a real estate agent, received two checks drawn on defendant bank, and took one to the main office of the bank, where it was certified. He then took the second check to a branch office, and the teller, not knowing of the certification of the first check, which had made the account too short to meet the second, certified the second check. *Held*, where the second check had not passed out of plaintiff's hands, and no rights of third parties had intervened, that the bank was liable, under the certification thereof, only for the balance the drawer had on hand when the certification was made. *(Rankin v. Colonial Bank, 64 N. Y. S., 32; 31 Misc. Rep., 227.)*

*Payment by bank of check certified by another bank.*

- 4 (Minn., 1898). At the time of a failure of a bank with which plaintiff had a deposit, plaintiff had nine checks on said bank outstanding, one of which had been certified by the bank, though plaintiff was not aware of the fact. Plaintiff made arrangements with defendant bank to pay the outstanding checks, and the nine checks were presented in a bundle, and, after being examined by the teller, paid, the teller failing to discover the certification on said check. Defendant knew that plaintiff had not examined the checks since he issued them. *Held*, it was a question of fact whether defendant was at fault in paying the check, although plaintiff stood by when the bundle of checks was presented, and ordered them paid. *(Tomlinson v. National German-American Bank, 75 N. W., 1028.)*

*When acceptance can not be withdrawn.*

- 5 (N. J.). A bill of exchange, drawn on defendant, was sent by plaintiff to a bank for collection, and on presentation to defendant was accepted by its treasurer and redelivered to the bank. On the same day defendant's treasurer learned that the drawer of the bill had failed two days before. On the next day defendant's treasurer applied to the bank's cashier for leave to revoke the acceptance and erase the indorsement, which the cashier declined to do, and notice was thereupon given the bank to refuse payment of the bill. At the time of the acceptance the drawer had no funds in defendant's hands, but was indebted to it. No fraud was shown on plaintiff's part. *Held*, that the defendant was bound by its acceptance. *(Trent Title Company v. Fort Dearborn National Bank of Chicago, 54 N. J., 33.)*

## CHECKS—Continued.

## MISCELLANEOUS—continued.

*Limitations.*

- 6 (Ky., 1900). The statute of limitations began to run against the holder of a certified check from the date of the bank's refusal to pay it to him; and the bank could not be estopped from pleading the statute by reason of the fact that it had in the publication of its condition required by law stated that such check was an indebtedness of the bank. (*Blades v. Grant County Deposit Bank et al.*, 2 Banking Cases, 494; 56 S. W., 415.)

## CERTIFICATION OF NOTE.

- 1 (U. S. C. C. A., 1896). The certification by a bank of a note made payable at such bank where the maker keeps an account is an absolute promise by the bank to pay such note, not as the debt of another, but as its own obligation, entitling the holder to suspend any remedy against the maker and relax steps to charge an indorser, and can not be rescinded by the bank because made under a misapprehension of fact as to the sufficiency of the maker's account to meet the note. (*Riverside Bank v. First National Bank of Shenandoah*, 74 Fed. Rep., 276.)
- 2 (U. S. C. C. A., 1896). The payment of a note by the bank at which it is made payable, although made under misapprehension of the state of the maker's account with the bank, concludes the bank as against the holder of the paper who has surrendered it, and the payment can not be recovered back of the holder. (Ib.)

## CIRCULATION.

*Treasury seal not essential to validity of national-bank notes.*

- 1 (U. S. C. C.). The circulating notes of a national banking association are valid though they do not bear the imprint of the seal of the Treasury. Such imprint was intended to be simply evidence of the contract, and forms no part of the contract itself. (*United States v. Bennett*, 17 Blatch., 357.)

*National-bank notes for less than \$1 unlawful—An obligation payable in goods is not illegal.*

- 2 (U. S. Dist. Ct., 1883). Section 5172 of the Revised Statutes provides how the notes contemplated by the national-bank act shall be printed and what they shall contain. No provision is made for a note of less than \$1. A note for a fractional sum is not only unknown to the law, but its issue is unlawful. (Sec. 3583.) The Supreme Court, by deciding that an obligation "payable in goods" was not illegal, has left the inference to follow almost necessarily that it was not such a note as was contemplated by statute, and therefore not taxable. (In re *Aldrich et al.*, 16 Fed. Rep., 369.)

*National-bank notes not a legal tender.*

- 3 (Ind.). The circulating notes or bills of a national bank are not legal tender. (*Arnsworth v. Scotten*, 29 Ind., 495.)

*Taxation of national-bank notes.*

- 4 (U. S. Statutes). The following act of Congress relative to the taxation of currency was approved August 13, 1894:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That circulating notes of national banking associations and United States legal-tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, and gold, silver, or other coin, shall be subject to taxation as money on hand or on deposit under the laws of any State or Territory: *Provided*, That any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction.

## CIRCULATION—Continued.

SEC. 2. That the provisions of this act shall not be deemed or held to change existing laws in respect of the taxation of national banking associations.

- 5 (Ind., 1869). The circulating notes of national banks, known as "national currency," are not exempt from taxation by a State. (Board of Commissioners of Montgomery County v. Elston, 32 Ind., 27; 1 N. B. C., 425.)
- 6 (Miss.). The State can not tax the circulating notes of national banking associations. (Horne v. Greene, 52 Miss., 452.)
- 7 (N. C., 1873). The State, until forbidden by Congress, has the power to tax national-bank bills. (Lilly v. The Board of Commissioners of Cumberland County, 69 N. C., 300.)
- 8 (N. C., 1873). The power of a State to tax the circulation of the national banks depends upon whether such circulation is for the use of the United States Government or for private profit. Congress can protect the circulation of these banks by forbidding the State to tax it. Until this is done the States have a right to tax it. (Ruffin v. Board of Commissioners, 69 N. C., 498; 1 N. B. C., 806.)

*Tax on average circulation not a revenue bill.*

- 9 (U. S. Sup. Ct., 1897). Section 41 of the national banking act imposing certain taxes upon the average amount of the notes in circulation of a banking association, now found in the Revised Statutes, is not a revenue bill within the meaning of the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." (Twin City Bank v. Nebeker, 167 U. S., 196.)

*State-bank notes.*

- 10 (U. S. Sup. Ct., 1869). The tax of 10 per cent imposed by the act of July 13, 1866 (14 Stat. L., 146, sec. 9), on the circulation of State banks used for currency and paid out by the national or State banks is not repugnant to the Constitution, either on the ground that the tax is a direct tax, which must be apportioned among the several States, or that the act impairs franchises granted by the State. (Veazie Bank v. Fenno, 8 Wall., 533; 1 N. B. C., 22.)
- 11 (U. S. Sup. Ct., 1869). Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain by suitable enactments the circulation of any notes not issued under its own authority. (Ib.)
- 12 (U. S. Sup. Ct., 1869). Such a tax is not a direct tax within the meaning of the clause of the Constitution which declares that "direct taxes shall be apportioned among the several States according to their respective numbers." (Ib.)
- 13 (U. S. Sup. Ct., 1879). The provision of section 3413 of the national-bank act, that "every national banking association, State bank or banker, or association shall pay a tax of 10 per cent on the amount of notes of any town, city, or municipal corporation paid out by them," is constitutional, even where its effect is to tax an instrumentality of a State. (Merchants' National Bank of Little Rock v. United States, 101 U. S., 1; 2 N. B. C., 100.)
- 14 (Pa.). The notes of State banks are not money within the meaning of the national-bank act, and a national bank may refuse to receive them as money in its own proper business. (Thorpe v. Wegefrath, 56 Pa. St., 82.)

*"United States currency" embraces national-bank notes.*

- 15 (La.). The circulating notes of national banking associations are included in the phrase "United States currency" when used in a penal statute. (State v. Gasting, 23 La. Ann., 1609.)

## CIRCULATION—Continued.

*Five per cent redemption fund.*

- 16 (U. S. Ct. Claims). The Treasurer of the United States can use the 5 per cent redemption fund in his hands for the redemption of circulation for that purpose only. (*Jackson v. United States*, 20 Ct. Cls., 298.)

*Receiver has no interest in bonds deposited for circulation.*

- 17 (U. S. C. C., 1871). The receiver of a national bank has no power over or interest in the bonds of a national bank deposited to secure the circulation, and he should not be made defendant in an action to determine title thereto. (*Van Antwerp v. Hulburt*, 1 N. B. C., 219; 8 Blatchford, 282.)

*Forgery of national-bank notes—Signing fictitious names.*

- 18 (U. S. C. C. A., 1903). The unauthorized signing of names to notes of a national bank, purporting to be those of the president and cashier, constitutes the crime of forging such notes, under Revised Statutes, section 5415 (U. S. Comp. St., 1901, p. 3662), whether the names so signed are in fact those of the president and cashier or of fictitious persons. (*Logan v. U. S.*, 123 Fed. Rep., 291.)

*Effect of statute making forged notes redeemable.*

- 19 (U. S. C. C. A., 1903). The fact that national-bank notes to which the signatures have been forged, and which have been put in circulation, are made redeemable by act July 28, 1892, 27 Stat., 322, chapter 317 (Comp. St., 1901, p. 3491), does not relieve one who forges the names of the president and cashier of a national bank to genuine but unsigned notes from the crime of forging such notes, as defined in Revised Statutes, section 5415 (U. S. Comp. St., 1901, p. 3662). (Ib.)

*Duplication of offense.*

- 20 (U. S. C. C. A., 1903). Two offenses can not be created out of the same criminal act by charging the defendant in one count with having forged a national-bank note and in another count with having forged the signatures to the same notes. (Ib.)

*Keeping in possession with intent to pass—Separate offenses.*

- 21 (U. S. C. C. A., 1903). Under Revised Statutes, section 5431 (U. S. Comp. St., 1901, p. 3671), which makes it a crime for any person to keep in possession, with intent to pass, any forged obligation of the United States, a defendant may be convicted of a separate offense for each one of such obligations he keeps in possession with intent to pass. (Ib.)

## CLEARING HOUSE.

*Clearing house may offset due bills against collections in its hands.*

- 1 (U. S. Sup. Ct., 1897). Where, by a special agreement, the clearing house was permitted to retain the paper of a bank each day until it settled its balance with the clearing house for that day, the clearing house is entitled, up to notice of insolvency, to set off the due bills for balances in clearings of the preceding days against the proceeds of the collections in its hands, but can not (it not being included in said special agreement) set off the amount due from the bank for loan certificates, as that would be a preference within the prohibition of Rev. St., 5242. (*Yardley v. Philler*, 167 U. S., 344.)

*Rules of clearing house.*

- 2 (Cal. Sup., 1903). It is competent for banks associated together in a clearing-house arrangement to bind themselves by rules governing, as between themselves, the effect of their indorsements, and such rules as to them will supplant the law. (*Crocker-Woolworth Nat. Bank of San Francisco v. Nevada Bank of San Francisco*, 5 B. C., 661; 73 Pac. Rep., 456.)



CLEARING HOUSE—Continued.

*New York clearing house—Construction of constitution—Paper returned as not good—Reclamation from bank required to refund.*

- 3 (N. Y. App., 1902). The constitution of the New York clearing house provides that all checks, drafts, or items in the exchanges reported as not good or missent shall be returned the same day to the bank from which they were received, and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing house for said drafts, checks, or items so returned. A later provision requires, in case of failure of any bank to promptly refund to the bank holding paper returned as not good, that such bank report the fact to the manager of the clearing house, who shall thereafter, with the approval of the clearing-house committee, readjust the clearing-house statement and declare the correct balance between such banks, provided such report be rendered before 1 o'clock of the same day. *Held*, not to repeal the first provision, so that a bank charged by the clearing house with the amount of drafts or checks returned as not good can allow such charge to stand against it in the account of the clearing house, and seek reclamation directly from the bank required to refund such amount under the direct rules of the clearing house. (Mt. Morris Bank v. Twenty-third Ward Bank, 5 B. C., 56; 64 N. E., 810.)

COLLATERAL SECURITIES.

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WHAT A NATIONAL BANK MAY TAKE AS COLLATERAL.

- 1 (U. S. Sup. Ct., 1878). A national bank may take as collateral security the stock of another national banking association. (*Germania National Bank v. Case, Receiver*, 99 U. S., 628.)
- 2 (U. S. C. C., 1869). A national banking association may take stock of a corporation as collateral security for a loan. (*Shoemaker v. The National Mechanics' Bank*, 2 Abb., U. S., 416; 1 N. B. C., 169.)
- 3 (U. S., 1875). A national banking association may take a pledge of personal chattels as security for a loan. (*Pittsburg Locomotive and Car Works v. State National Bank of Keokuk*, 2 Cent. L. J., 692; 1 N. B. C., 315.)
- 4 U. S. C. C. A., 1894). A contract by which one bank pledges any of its property in the hands of another bank as collateral to notes discounted for and guaranteed by it authorizes the discounting bank to hold a deposit balance standing to the credit of the borrowing bank at the time of its insolvency, as collateral to any liability, then or at maturity of the discounted notes, until the amount of the lien has been ascertained. (*Fisher v. Continental National Bank*, 64 Fed. Rep., 707.)

## COLLATERAL SECURITIES—Continued.

## WHAT NATIONAL BANKS MAY TAKE AS COLLATERAL—continued.

- 5 (Md. App., 1876). A national bank received from a customer bonds as collateral security for a debt then existing and for future obligations. Afterwards, and after the customer had paid his indebtedness, the bonds were stolen from the bank. *Held*, (1) that the bank was not a gratuitous bailee of such bonds; (2) that it had power to take the bonds as security for existing or future loans; (3) that it was liable if it failed to exercise ordinary care and diligence in keeping the bonds; and (4) that the measure of damage was the value of the bonds when stolen and not when demand of them was made. (*Third Nat. Bank of Baltimore v. Boyd*, 44 Maryland, 47; 1 N. B. C., 545.)
- 6 (N. Y., 1876). A national bank indorsed upon a contract of sale and delivery between A. and B. that B. deposited \$2,500 in the bank, "to be held by us as collateral security for the faithful fulfillment of the within contract." *Held*, (1) that the bank had the power to receive the deposit and enter into the said contract; (2) but that, even if the contract was ultra vires, the bank would be estopped from setting up that defense in an action by A., as he had performed his part of the agreement, relying on the undertaking of the bank. (*Bushnell v. The Chautauqua County National Bank*, 10 Hun., 378; 1 N. B. C., 794.)
- 7 (Ohio). A national banking association may take as collateral security for a loan a warehouse receipt for merchandise. (*Cleveland, Brown & Co. v. Shoeman*, 40 Ohio St., 176.)
- 8 (Tex., 1901). Incidental to the power of loaning money on personal security, a national bank, in the ordinary course of business, may accept stock of another corporation as collateral security; and may, by the enforcement of its rights as pledgee, become the owner of the collateral and subject itself to liability as other stockholders. (*Fulton v. National Bank of Denison*, 62 S. W. Rep., 84; 26 Tex. Civ. App., 115.)

*Guaranty as collateral.*

- 9 (Utah). In order to make a guaranty of a loan collateral therefor a consideration to the guarantor is required and the guaranty must be so drawn as to cover specifically any present or future indebtedness intended to be secured. (*Deseret National Bank v. Dinwoodey*, 53 Pac. Rep., 215; 17 Utah, 43.)

*What a national bank may not take as collateral security.*

- 10 (U. S. Sup. Ct., 1880). A national bank refusing to discount a note sent to it for that purpose can not hold the note as security for an overdraft. (*Bank of Montreal v. White*, 154 U. S., 660.)

## WHAT AMOUNTS TO A DEPOSIT OF SECURITIES AS COLLATERAL.

- 1 (Me.). This suit was brought to recover the value of certain bonds which, it is claimed, had been left at the bank as collateral security for money which the bank might, from time to time, advance the plaintiff. The plaintiff testified that on July 1, 1868, he went to the bank to obtain a loan upon this security; that the bonds could not be found, but that he received the money. The defendant requested the court to instruct the jury that "if the bonds were not found by the bank when the note of July 1 was offered and were not afterwards found the jury are not authorized to find that they were taken and held as collateral security for the note of July 1." *Held*, that this instruction was properly refused. (*Dearborn v. The Union National Bank of Brunswick*, 61 Me., 369.)

*Possession essential to validity of pledge.*

- 2 (La.). The plaintiff, a judgment creditor of the defendant, had the steamboat *Kinta* seized. The defendant had pledged it to the Third National Bank of New York, but remained in possession for his own account, and never completed the pledge by an actual delivery to

## COLLATERAL SECURITIES—Continued.

## WHAT AMOUNTS TO A DEPOSIT OF SECURITIES AS COLLATERAL—continued.

the pledgee. The act of pledge was drawn up in the common-law form and was intended to operate as a chattel mortgage. It contains, as to the form of the act, the essentials of an act of pledge. (*Citizens' Bank of Louisiana v. Janin* (Third National Bank of New York, Intervener), 15 So., 471; 46 La. Ann., 995.)

- 3 (La.). The Third National Bank, as pledgee, claimed the proceeds of the sale. The property, when it was seized, was in the possession of the subtenant. It is not proved that the plaintiff colluded with the defendant and thereby gained an improper advantage. Pledge is not made perfect by the consent of the parties. It requires absolute possession. The alleged pledgee never was in possession during the tenure of the defendant. (Ib.)
- 4 (La.). It (the Third National) could not obtain possession through the agency of the sublessee, who held possession for his lessor, the defendant. (Ib.)
- 5 (La.). A pledge can not be made perfect by the sublessee's delivery of possession without the consent of his lessor. (Ib.)
- 6 (La.). The obligation of the lessor to account for the property and whatever revenues were realized therefrom, binding between him and his creditor, the Third National Bank—the property not having been delivered—did not affect his other creditors, who could seize the property in his possession or in that of his sublessee, who held possession for his lessor. (Ib.)

*Clearing house as holder of securities.*

- 7 (Pa., 1895). A clearing-house committee, created by the agreement of several banks, which receives deposits from such banks of securities at a fixed ratio on their capital stock, and issues certificates therefor to be used in paying balances, becomes an owner, for value, of the securities. (*Philler v. Patterson* (Pa. Sup.), 32 A., 26; 168 Pa. St., 468.)

*Bill of lading for goods in transitu held by bank as security.*

- 8 (Colo., 1895). The fact that a transfer of a bill of lading to a bank as security was, after its doors were closed for the day, for the purpose of deposit and check does not affect its right as against the vendor who stops the goods in transit, though before its doors are again opened it learns of the insolvency of the vendee. (*First National Bank v. Schmidt*, 6 Colo. App., 216; 40 P., 479.)
- 9 (Colo., 1895). As against the right of a vendor to stop goods in transitu, a bank to which the vendee has transferred the bill of lading as security is a holder for value, even though the transfer was for a preexisting debt, and not for a loan made on the promise of such transfer. (Ib.)
- 10 (N. Y.). Where a seller ships goods under an agreement by the terms of which the title does not vest in the buyer until accepted by him, and takes a bill of lading for the goods so shipped, which he assigns to a bank to secure payment of a draft for the price of the goods drawn on the consignee by the seller, and discounted for him by the bank, the bank acquires legal title to the goods, which it is entitled to hold until payment of its claim. (In re Nonmagnetic Watch Co. of America, 34 N. Y. S., 1017; 89 Hun., 196.)
- 11 (W. Va., 1895). A bank which discounted a draft to which was attached, deliverable to its order, a bill of lading of the goods against which the draft was drawn was not required on notice of nonacceptance of the draft to charge the amount thereof against the account of the drawer, which was large enough to pay the draft, that it might enforce its lien on the property against an attaching creditor of the drawer. (*Neill v. Rogers Bros. Produce Co.*, 41 W. Va., 37; 23 S. E. Rep., 702.)

## COLLATERAL SECURITIES—Continued.

## RIGHTS AND LIABILITIES OF HOLDER OF COLLATERAL.

*Bank has general lien on collaterals.*

1. A bank has a general lien on all collaterals deposited with it unless they are deposited for a special purpose or the payment of a particular loan.  
 (U. S. C. C.) *Kelley v. Phelan*, 5 Dill., 228;  
 (Md.) *Baltimore, etc., Ry. Co. v. Wheeler*, 18 Md., 372;  
 (Md.) *Miller v. Farmers' Bank*, 30 Md., 392;  
 (Mass.) *Wood v. Boylston Bank*, 129 Mass., 358;  
 (N. Y.) *Bank of Metropolis v. New England Bank*, 1 How., 234.

*Bank may not have both general and contract lien on collaterals.*

2. A banker's lien for the amount of the balance of its general account does not exist when the securities have been deposited with the bank for a special purpose, or for the payment of a particular loan.  
 (U. S. C. C., 1890) *Armstrong v. Chemical National Bank*, 41 Fed. Rep., 234;  
 (Ky.) *Masonic Savings Bank v. Bangs*, 84 Ky., 135;  
 (La.) *Teutonia National Bank v. Loeb*, 27 La. Ann., 110;  
 (Mass.) *Neponset Bank v. Leland*, 5 Met., 259;  
 (N. Y.) *Duncan v. Brennan*, 83 N. Y., 487.

*Contra: Bank may assert both general and contract lien on collaterals.*

- 3 (Ark., 1896). In an action against a bank to recover notes which it claims to hold as security for the payment of a debt the assertion of a general lien by the defendant is not inconsistent with its claim of a lien by special contract. (*Cockrill v. Joyce*, Ark., 35 S. W. Rep., 221; 62 Ark., 216.)  
 (NOTE.—Bankers now use a form of note giving them both a general and contract lien on collaterals.)

*Who a bona fide holder of collaterals.*

- 4 (U. S. Sup. Ct., 1879). A creditor who takes a negotiable note, before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a preexisting debt, in consideration of an extension of time to the debtor, actually granted, is, according to the law merchant, a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice. (*Oates v. First Nat. Bank of Montgomery*, 100 U. S., 239.)
- 5 (N. Y.). The transferee of a note before maturity as collateral security for a loan made in good faith is a bona fide holder to the extent of the loan. (*Pearce & Miller Engineering Company v. Brouer* (City Ct. N. Y.), 31 N. Y. S., 195.)

*Effect of acts ultra vires.*

- 6 (U. S. C. C. A., 1898). It is no defense to an action against a national bank for money had and received that the collateral security it gave to plaintiff was issued without authority of law. (*Williams v. American Nat. Bank of Arkansas City, Kans.*, et al., 85 Fed. Rep., 376.)
- 7 (Tex., 1901). Conceding that a national bank can not acquire title in the stock of a corporation which is pledged to it, the pledgor can not recover back the stock without satisfying the bank for its advances. (*Fulton v. Nat. Bank of Denison*, 62 S. W. Rep., 84; 26 Tex. Civ. App., 115.)

*Action on pledged note not abated by payment of debt.*

- 8 (Tenn., 1894). Where the debt for which a note was pledged is paid pending an action on the note by the pledgee, the latter may continue the action, subject to all equitable defenses, holding the proceeds as trustee for the pledgor. (*First Nat. Bank v. Mann*, Tenn., 27 S. W., 1015; 94 Tenn., 17.)

## COLLATERAL SECURITIES—Continued.

## RIGHTS AND LIABILITIES OF HOLDERS OF COLLATERAL—continued.

*Bank officers' contract to provide collateral to bank.*

- 9 (Nebr., 1901). The contract of a defaulting bank officer to furnish collateral security for his indorsement on paper previously sold to the bank by him so as to replenish the assets of the bank and enable it to resume business is not illegal, and after such securities have been furnished and the bank has resumed business, the person furnishing such securities at the request of such defaulting officer, with the knowledge of the use to be made thereof by him, can not be heard to say that there was no consideration for furnishing the same. (*Tecumseh Nat. Bank v. Chamberlain Banking House et al.*, 88 N. W. Rep., 186; 63 Nebr., 163.)

*Rights of indorser of note secured by collaterals.*

- 10 (U. S. C. C. A., 1895). Where the holder of an indorsed note has exchanged collateral, held to secure such note, without the indorser's consent, the measure of the indorser's damages is the difference between the value of the collateral originally held and that for which it is exchanged, at the time of the exchange. (*Nelson v. First National Bank of Killingly*, 69 Fed. Rep., 798.)

*Taking of collateral, when not an extension of debt secured.*

- 11 (Colo. Sup., 1896). The acceptance by a payee, as collateral of the note of a third party secured by mortgage payable after maturity of the original note, does not establish an extension of the time of payment of the original note to the date when the collateral note becomes payable, in the absence of evidence of an express agreement therefor. (*Fisher v. Denver National Bank*, 45 P., 440; 22 Colo., 373.)

*Securities to indemnify sureties inure to benefit of creditors.*

- 12 (Mo. Sup., 1879). Securities taken by sureties for their indemnity inure to the benefit of the creditor. (*Thornton v. National Exchange Bank*, 71 Mo., 221; 3 N. B. C., 513.)

*Creditor entitled to collateral held by surety.*

- 13 (N. Y.). The maker of a note held by plaintiff gave to one J., who was accommodation indorser thereof, a second note, indorsed by defendant, to secure J. against loss by reason of his indorsement, and J. transferred the collateral note to plaintiff. *Held*, that plaintiff could sue on the collateral note, though J. had paid nothing on account of his liability as indorser, a creditor being entitled to all collaterals given by the principal debtor to his sureties. (*Merchants and Manufacturers' National Bank v. Cummings, Sup.*, 29 N. Y. S., 782.)

*Duty of holder of collaterals to protect them.*

- 14 (U. S. C. C. A., 1895). A person having notes in his possession as collateral security for a debt is bound, so far as the general owner of the notes is concerned, to use reasonable diligence to protect the security so held, and see that it is not outlawed. (*Northwestern National Bank v. J. Thompson & Sons Manuf'g Co.*, 71 Fed. Rep., 113.)
- 15 (Ala.). If a part owner of certificates of stock pledges them, with the consent of the other owner, as collateral security for his own debt, and they are converted by the pledgee, the pledgor is entitled to recover as if he were the sole owner, the pledgee being estopped from denying his absolute ownership. (*Sharp v. Nat. Bank of Birmingham*, 87 Ala., 644.)
16. It is the duty of a receiver, if a secured debt is so reduced by dividends that the security will more than pay it, to redeem the security for the benefit of his trust.  
(Pa.) *Miller's Estate*, 82 Penn. State, 113;  
(Vt.) *West v. Bank of Rutland*, 19 Vt., 403.

## COLLATERAL SECURITIES—Continued.

## RIGHTS AND LIABILITIES OF HOLDERS OF COLLATERAL—continued.

*Care of collateral securities.*

- 17 (Md. Appls., 1876). *Held*, that a bank was liable if it failed to exercise ordinary care and diligence in keeping the bonds deposited as collateral, and that the measure of damage was the value of the bonds when stolen and not when demand of them was made. (*Third Nat. Bank of Baltimore v. Boyd*, 44 Maryland, 47; 1 N. B. C., 545.)
- 18 (Me.). A bank is bound to take only ordinary care of United States bonds pledged to it as collateral security for the payment of a note discounted by the bank. (*Jenkins v. National Village Bank of Bowdoinham*, 58 Me., 275.)
- 19 (Me.). A writing, executed by the cashier, acknowledging the receipts by the bank, "to be returned to him on the payment of his note in four months, dated May 9, 1866," is not a contract which increases the common-law liability of the bank, even if the cashier had the authority to do so. (*Ib.*)
- 20 (Tex.). Creditors holding collateral security are liable for negligence in realizing thereon. (*National Bank of Jefferson v. Bruhn and Williams*, 64 Tex., 571.)
- 21 (Tex., 1894). In an action by a pledgee upon the debt secured by the pledge he is not required to account for nonnegotiable securities pledged to him by defendant, in the absence of any allegation or proof that he has lost or misappropriated them. (*Marberry v. Farmers and Mechanics' National Bank*, 26 S. W., 215; 6 Tex. Civ. App., 607.)

*When pledgee of stock in a corporation liable for its debts.*

- 22 (Ala.). A pledgee of stock in a private corporation holding the certificates as collateral security, and having had the transfer duly entered on the books of the corporation, is liable to creditors as the owner thereof on the subsequent insolvency and dissolution of the corporation, and this liability is governed by the law in force when their debts were created (Rev. Code, 1867, sec. 1760), although it had been repealed or abrogated before the stock was transferred to him. (*National Commercial Bank v. McDonnell*, 92 Ala., 387.)

*When bank not liable as stockholder on collaterals bought in.*

- 23 (U. S. Sup. Ct., 1900). A bank which receives as collateral security for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank and the debtor, who claims that the sale is invalid, the stock continues to be held merely as a collateral for the debt. (*Robinson, receiver, etc., v. Southern Nat. Bank of New York*, 180 U. S., 295.)

*Bank's negligence in accepting spurious bonds as collateral.*

- 24 (N. Y.). A bank is not chargeable with negligence for receiving spurious bonds as collateral for a loan which it is negotiating for another, where the latter credited the person who delivered the bonds and obtained the loan as safe and trustworthy to deal with, and the bank examined the bonds in the manner usual and customary among bankers under like circumstances, though a careful examination might have enabled it to ascertain that the bonds were not genuine. (*Judgment*, 56 N. Y. S., 244, 37 App. Div., 601, affirmed; *Clinton Nat. Bank v. Nat. Park Bank*, 59 N. E. Rep., 1120; 165 N. Y., 629.)

## SALE OF COLLATERAL SECURITIES.

*Sale of collaterals.*

- 1 (U. S. C. C., 1899). A court has no power to order or authorize the receiver of a national bank to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Rev. St. 5234 to order the sale or compounding of bad or doubtful

## COLLATERAL SECURITIES—Continued.

## SALE OF COLLATERAL SECURITIES—continued.

- debts or the sale of real or personal property of the association. (In re Earle, 92 Fed. Rep., 22.)
- 2 (U. S. C. C. A., 1901). One who sells notes secured by a second mortgage, falsely representing such mortgage to be a first lien, can not invoke the record of a prior mortgage held by himself as notice to the purchaser, but as between them the purchaser is entitled to priority of lien. (*Zeis v. Potter et al.*; *Potter et al v. Zeis*, 105 Fed. Rep., 671.)
  - 3 (U. S. C. C. A., 1901). The reasonable rule would seem to be that purchasers of overdue or nonnegotiable paper should take subject to the equities of all who appear or are known to have had an interest in it. (Ib.)
  - 4 (U. S. C. C. A., 1901). A borrower from a bank pledged as collateral, among other securities, a certificate of purchase of real estate at judicial sale, the consideration stated therein being \$6,750. The certificate was in an envelope, which was indorsed with the figures "\$4,750." On inquiry as to the discrepancy, the pledgor stated that a third person owned an interest of \$2,000 in the certificate, and that he could only pledge the same for the amount of his own interest, which was \$4,750. Whether the name of the third person interested in the certificate was asked for or given did not clearly appear. In fact, as between the pledgor and such third person the latter was entitled to priority of interest in the certificate. A statute of the State (*Hurd's Rev. St. Ill.*, c. 77, sec. 29) made such certificates assignable by indorsement, and declared the assignee "entitled to the same benefits therefrom in every respect that the person therein named would have been if the same had not been assigned." *Held*, that the bank was put upon inquiry, and took the certificate subject to the rights which might have been asserted as against the pledgor. (Ib.)
  - 5 (U. S. C. C. A., 1901). Where a borrower from a bank presented collaterals to the assistant cashier, who was authorized to represent the bank in the transaction, and was directed by the latter, in accordance with custom, to take such collaterals to the note teller, who had charge of the collaterals to be checked up, notice to the teller in regard to the rights of a third person in one of the securities pledged was notice to the bank. (Ib.)
  - 6 (Ala.). When shares of stock in a private corporation are pledged as collateral security for a debt, and default is made in the payment of the debt at maturity, the pledgee may file a bill in equity to foreclose the pledge by a sale under the order of the court, or he may exercise the implied power to sell without resorting to judicial proceedings; but if he elects to pursue the latter remedy, the sale must be at public auction, in the absence of a special agreement, and reasonable notice must be given to the pledgor; and if he sells privately, without notice, becoming himself the purchaser, the relation between him and the pledgor is not thereby dissolved. (*Sharp v. National Bank of Birmingham*, 87 Ala., 644.)
  - 7 (Ala.). If the pledgor, when notified of the irregular or unauthorized sale, accepts its benefits, giving his note for the balance of his debt remaining unpaid, this is presumptively a ratification of the sale, and he can not afterwards impeach it; but if he acted in ignorance of the fact that the pledgee himself was the purchaser, and did not intend to make an absolute and unconditional ratification without regard to the facts attending the sale, he may disaffirm it within a reasonable time after discovering that the pledgee was the purchaser. (Ib.)
  - 8 (N. Y. Sup.). One holding collaterals as security for a debt due at a certain time, and authorized by his contract to sell on maturity of the debt, need not demand payment before selling. (*Franklin National Bank v. Newcombe*, 37 N. Y. S., 271.)
  - 9 (N. Y. Sup.). One having collaterals as security for a note, which by the terms of his contract he was at any time after maturity of the note

## COLLATERAL SECURITIES—Continued.

## SALE OF COLLATERAL SECURITIES—continued.

at liberty to sell at private or public sale, with or without notice, can not be held liable by reason of selling them when the market was in poor condition, they having been sold two weeks after maturity of the note, at public sale, after notice. (*Franklin National Bank v. Newcombe*, 37 N. Y. S., 271.)

*Receiver may sell collateral without authority of Comptroller.*

- 10 (La., 1900). A receiver of an insolvent national bank may apply to a court of record of competent jurisdiction for an order to sell stocks and bonds in pledge in his hands, and it is not necessary for him to secure formal authorization of the United States Comptroller to make the application; nor is it necessary that he should have the formal authority of the Comptroller to sell. (*Richardson v. Turner*, 28 So. Rep., 158.)

*Disposition of surplus realized on securities.*

- 11 (Ind., 1898). A company indebted to a national bank on a note, and to the president and cashier of the bank on indorsements made for it, turned over to such officers its property, to be sold, and the proceeds applied to the indebtedness; the surplus, if any, to be paid to the company. *Held*, that without regard to the question of liability of the officers, the bank, as such, was liable to the company for the surplus which it received and used in its business. (*Paxton v. Vincennes Mfg. Co.*, 50 N. E. Rep., 583; 20 Ind. App., 253.)
- 12 (Minn., 1893). Plaintiff had in his possession collateral security for a debt due from a third party, who also owed the defendant. *Held*, that an agreement by the parties in interest that any sum received on such collateral security, in addition to the indebtedness first secured thereby, should be applied on the debt due from defendant operated as an equitable assignment to defendant of such surplus, if any there should be. (*Second National Bank v. Sproat*, 56 N. W., 254; 55 Minn., 14.)
- 13 (N. J.). Where a debtor assigns to different persons assets as collateral security for their claims, after such claims are satisfied, from whatever source, if any balance from such assets remain they are bound to return such balance to the debtor or to his representative. (*Whittaker v. Amwell*, National Bank (N. J. Ch.), 29 A., 203; 52 N. J. E., 758.)
- 14 (N. Y.). Plaintiff deposited a stock certificate with a firm who unlawfully used it as collateral security. The money obtained thereon was in the form of a check, which said firm deposited to its credit in defendant bank. Said firm was also indebted to defendant, which was authorized to apply to the payment of said indebtedness any moneys on deposit to the credit of said firm. The firm also deposited with said bank stock belonging to another person as collateral to secure its indebtedness to said bank, and the bank, after applying the moneys on deposit to said indebtedness, sold the collateral security to satisfy the balance remaining due. *Held*, that the amount realized on the sale in excess of the balance due the bank belonged to the owner of said collateral, and not to plaintiff. (*Hatch v. Fourth National Bank*, 41 N. E. Rep., 403; 147 N. Y., 184.)
- 15 (Ohio). Where a partnership borrows money from a bank and gives a note, and pledges as collateral another note of the partnership, and the contract of pledge only gives to the bank the right to hold such note as collateral for the one so executed, the bank has not a banker's lien on the residue for the payment of another note indorsed by the partnership to it before the pledge of the collateral, and on which the firm is liable to the bank, since the bank is bound by its contract. (*Stowe v. First National Bank*, 1 O. C. D., 292.)
- 16 (Pa. Sup., 1884). A judgment creditor realized the amount of his demand from collateral security. The debtor notified him that the amount due was disputed, and required him not to apply the collateral to its pay-



## COLLATERAL SECURITIES—Continued.

## SALE OF COLLATERAL SECURITIES—continued.

ment until the amount was determined. The plaintiff, notwithstanding, applied the funds and satisfied the judgment of record. *Held*, that the defendant was entitled to have the entry of satisfaction struck off and be admitted to defend. (*Guthrie v. Reid*, 107 Penn. St., 251; 3 N. B. C., 751.)

*Conversion of collaterals.*

- 17 (Ala.). A sale of shares of stock pledged as collateral security without notice to the pledgor is not a conversion when it appears that the stock was knocked down to a nominal purchaser without his knowledge or consent, and that the certificates, though changed into his name, were never delivered to him but were retained by the pledgee until after a subsequent sale pursuant to notice. (*Terry v. Birmingham National Bank*, 93 Ala., 599.)
- 18 (Ala.). For an unauthorized sale of stock pledged as collateral security amounting to a conversion, the pledgor is entitled to recover as damages the market value of the stock at the time of the sale, with interest to the day of the trial; and the jury may, in their discretion, allow the highest market value at any time between the sale and the trial. (Ib.)
- 19 (Ga., 1893). The cashier of a bank has no authority to assign collaterals belonging to himself which were given to secure a loan to another person for the cashier's benefit. (*Merchants' National Bank v. Demere*, 19 S. E., 38; 92 Ga., 735.)
- 20 (Ga., 1893). One who borrows money from a bank for the cashier thereof on collaterals belonging to the cashier is not entitled to credit for amount of such collaterals after they have been wrongfully withdrawn and converted by the cashier. (Ib.)
- 21 (Ohio). Where collateral is deposited with a bank as security for the payment of a note, the bank can not, upon renewing the note, credit the collateral against both the new note and other indebtedness of the maker to it without the knowledge or consent of the maker that the collateral is to be used as security for the other indebtedness. (In re Meyers, 7 Ohio N. P., 262; 10 Ohio S. & C. P. Dec., 121.)

*Banks—Acts of president—Authority—Repudiation.*

- 22 (U. S. C. C. A., 1903). Where the directors of a bank had not authorized its president to make an agreement to extend time to a debtor or to refrain from selling pledged stock for the liquidation of the debt, and the circumstances raised no implication of authority, and such agreement by the person who was president was never ratified, the bank was not bound thereby. (*Arbogast v. American Exchange National Bank of Chicago*, 125 Fed. Rep., 518.)

*Same—Sale of collaterals—Good faith.*

- 23 (U. S. C. C. A., 1903). After more than eight months had elapsed since a debtor's assignment without any payment having been made on the debt for which collaterals had been deposited, the creditor deposited the collaterals with its attorney, with directions to realize thereon, and he notified the assignee that unless the claim was paid promptly he would sell the collateral. After an extension had been refused and the assignee was unable to pay, the attorney notified him of a bid of \$30,000 for the collateral, and after the assignee acknowledged his inability to find a better one the attorney sold the collateral for that price. *Held*, that the sale was valid. (Ib.)

*Same—Adequate remedy at law.*

- 24 (U. S. C. C. A., 1903). Where certain stock was delivered to a bank as credit for a loan, and, the loan not having been paid, the stock was sold for an alleged inadequate price, and plaintiff charged that the directors and officers of the bank had participated in a campaign inaugurated by its president to bear the stock, but failed to prove that anyone connected with the bank, except the person who was

## COLLATERAL SECURITIES—Continued.

## SALE OF COLLATERAL SECURITIES—continued.

president, knew of or took part in such campaign, the debtor had an adequate remedy at law for damages against the persons who depreciated the stock in the market, and he was therefore not entitled to relief in equity by redemption from the bank's sale. (Ib.)

## COLLECTIONS.

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## GENERALLY.

*What law governs.*

- 1 (U. S. C. C.). Collections are governed by the law of the State in which they are made. (*Kent v. Dawson Bank*, 13 Blatchf., 237.)

*Holder of note for collection may sue thereon.*

- 2 (Cal., 1896). Transfer of a note to a bank for collection gives it such ownership thereof that it can sue the maker thereon. (*First National Bank v. Hughes* (Cal.), 46 P., 272; 114 Cal., XVI.)

*Contra.*

- 3 (Ky., 1897). Plaintiff bank can not recover upon a note assigned to it merely for the purpose of collection. (*First National Bank v. Payne*, 42 S. W. Rep., 736.)

*When first bank pays draft for insolvent drawee bank.*

- 4 (Wis.). Where a draft was sent to defendant bank for collection, and defendant, at the request of the drawee, advanced the funds for its payment and mailed a draft to the payee stating that it was "in payment of the draft" sent to it for collection, defendant could not,

## COLLECTIONS—Continued.

## GENERALLY—continued.

after discovering the insolvency of said drawee, intercept the letter and destroy the draft so mailed. (*Canterbury v. Bank of Sparta*, 64 N. W. Rep., 311; 91 Wis., 53.)

*When collecting bank may obtain preference of its own claim.*

- 5 (Nebr., 1898). A bank holding paper only for the purpose of collection, if it duly presents the paper for collection and is guilty of no misrepresentation or fraudulent concealment, is not prohibited from obtaining a preference for a debt owing to itself from the same debtor. (*United States National Bank v. Westervelt*, 75 N. W. Rep., 857; 55 Nebr., 424.)

*Rights of correspondent bank against attachment creditor of holder.*

- 6 (N. Y., 1898). Where a bank cashed drafts, which were accompanied by the bills of lading, drawn upon the consignee of a shipment of goods it became the owner of the drafts and bills of lading, and of the goods as covered by the latter, and, as against the attaching creditor, entitled to the proceeds of the goods, the fact that the bank as a general rule, in receiving checks or drafts on deposit or for collection acted only as the agent for the depositor being immaterial. (*American Trust and Savings Bank v. Austin et al.*, 1 Banking Cases, 122; 55 N. Y. S., 561.)

*Rights of drawee against receiving bank.*

- 7 (Ala., 1898). Plaintiff purchased a carload of hay from B., who drew on plaintiff for the price, attaching a bill of lading to the draft. The draft was payable "on the arrival of car of hay" to the order to C., "cashier," and was indorsed "For the collection account of Missouri National Bank," and was collected through a bank where plaintiff resided. Plaintiff for cause rescinded the sale. *Held*, that the Missouri National Bank, in an action against it by plaintiff for money had and received, could not deny ownership of the draft, not because such denial would be contradicting a written instrument by parol, but because the plaintiff had acted and acquired his rights without knowing that the bank was only a collecting agent. (*Eufaula Grocery Co. v. Missouri Nat. Bank*, 24 So. Rep., 389; 118 Ala., 408.)

*Duty of bank to use diligence.*

- 8 (Nebr., 1900). A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it and exercise proper diligence to obtain payment. (*Omaha Nat. Bank v. Kiper et al.*, 2 Banking Cases, 419; 60 Nebr., 33.)

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION—GENERALLY.

- 1 (U. S. C. C., 1883). Checks deposited in a bank by its customers for collection do not at once become the property of the bank; the bank continues to be the agent of the customer until the collection of the check, which remains, in the meantime, the property of the depositor. (*Balbach et al. v. Frelinghuysen, Receiver, etc.*, 15 Fed. Rep., 675.)
- 2 (U. S. C. C., 1883). The rule is different where such checks are deposited to make good an overdrawn account of the customer or when the amount deposited by check is immediately drawn against. In that case the bank may hold the deposit until the overdraft is made good from other sources. (*Ib.*)
- 3 (U. S. C. C., 1883). The indorsement by a customer of a check deposited for collection is only intended to put the paper in such shape that the bank may collect it, and not to thereby pass the title to the bank. (*Ib.*)

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION—GENERALLY—continued.

- 4 (U. S. C. C., 1883). The practice which has grown up among banks to credit deposits of checks at once to the account of the depositor, and to allow him to draw against them before the collection is a mere gratuitous privilege, which does not grow into a binding legal usage. (Ib.)
- 5 (U. S. C. C., 1896). The title to checks and drafts deposited in a bank for credit to the depositor's account remains in such depositor until they are collected, although the amount thereof is at the time entered on his book as a credit. (*City of Philadelphia v. Eckles*, 98 Fed. Rep., 485.)
- 6 (Colo. App., 1900). Papers transferring the title to certain property and a check on a foreign bank for the purchase price of the property were deposited with defendant bank, the papers to be delivered to the purchaser when the bank had collected the check and deposited the proceeds to plaintiff's credit. The defendant bank forwarded the check, which was honored, and a draft for the amount of which was mailed, but before the draft was received the foreign bank and the purchaser requested the return of the draft, which the defendant did. *Held*, that the defendant bank was estopped to say that it had not received the money, and that plaintiff could recover the amount of the draft. (*Gregg v. Bimetallic Bank*, 2 Banking Cases, 424.)
- 7 (Ill., 1895). Where a draft upon a nonresident drawee is deposited for collection with a local bank, and by it transmitted to another bank for collection, according to custom the local bank is not responsible for loss occasioned by the default of the latter bank, since such latter bank is the agent of the depositor. (58 Ill. App., 61, affirmed; *Waterloo Milling Co. v. Kuenster*, (Ill. Sup.), 41 N. E., 906; 158 Ill., 259.)
- 8 (Ill.). Where a bank, on collecting drafts for another bank, transmits bank drafts to such bank, which credits the depositor with the amount of such drafts, and then collects only part of the drafts on account of the failure of the other bank, it has a right of action against the depositor for the deficit. (Ib.)
- 9 (Ill.). Where plaintiff had indorsed in blank and deposited in a bank to his credit certain checks, which such bank indorsed to defendant for collection to his credit, plaintiff could not hold defendant liable for the amount of such checks, though such bank had become insolvent, as his indorsement transferred a good title, free from all equities, in his favor. (Judgment 74 Ill. App., 429, affirmed; *Doppelt v. Nat. Bank of the Republic*, 51 N. E. Rep., 753; 175 Ill., 432.)
- 10 (Ind., 1899). The usual and ordinary custom by which banks are generally controlled in collecting paper does not require them to hold the money collected separate and apart from its own funds and remit the identical money collected. And when the money is collected, and the proper credit given to the person by whom the paper was sent for collection, as a general rule the relation of debtor and creditor is created between the bank and such person, and the relation of trustee and cestui que trust does not arise. And the fact that the bank is insolvent when the proceeds of the paper are mingled with its own funds are immaterial in this connection, if its officers are not aware of its insolvency. (*Union Nat. Bank v. Citizens' Bank of Union City et al.*, 1 Banking Cases, 712; 153 Ind., 44.)
11. Where the holder of a bill of exchange payable at a distant place, deposits it with a local bank for collection, he thereby assents to the course of business to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent and is responsible to him directly for negligence in failing to present the bill for payment within the proper time.  
(*Iowa*) *Guelich v. The National State Bank of Burlington*, 56 Iowa,

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION—GENERALLY—continued.

- 434; (Tex., 1898) *Schumacher v. Trent*, 44 S. W., 460. 18 Tex. Civ. App., 17.)
- 12 (Ky., 1899). To decide whether or not a customer should be credited by the proceeds of a draft or check presented to the bank is within the apparent scope of the business of its cashier. (*German Nat. Bank v. Grinstead et al.*, 2 Banking Cases, 50; 52 S. W., 951.)
- 13 (Minn., 1899). A draft was presented by the drawer to his bank, and he received credit for it on his account. His pass book contained a notice that the bank, in receiving drafts on deposit or for collection, acts only as agent, and assumes no responsibilities. The drawer had for years been in the habit of delivering drafts to the bank, and receiving credit for them on pass books containing such notice. (In re Bank of Minnesota, 77 N. W. Rep., 796; *South Park Foundry and Machine Co. v. Chicago G. W. Ry. Co.*, id.)
- 14 (Minn., 1899). It was the usual custom of the bank when a draft delivered by a customer was not paid in the usual course of business by the drawee or acceptor, to charge it back to the customer, and the drawer knew of this custom. There was no evidence that the drawer, in making deposits of drafts, ever objected to the terms of the notice, or to the known custom of the bank. *Held*, that the title to the draft did not pass absolutely to the bank. (Ib.)
- 15 (Mo., 1899). That a bank receiving a worthless check in payment of a draft regarded the check as its own is shown by the bringing of attachment suits against the maker of the check, and this, though it notified the bank from which the check was remitted, and to whom it had sent the proceeds shortly after the commencement of the attachment suits, that it would hold such bank liable for the amount. (*National Bank of Commerce of Kansas City v. American Exchange Bank of St. Louis*, 52 S. W. Rep., 265; 151 Mo., 320.)
- 16 (N. C., 1896). Plaintiff bank sent a check, indorsed for collection, to its correspondent, which also indorsed it for collection and forwarded it to defendant bank. Defendant credited the amount on its account with such correspondent, and collected the check. Subsequently the correspondent bank, which was indebted to defendant, made an assignment. *Held*, that defendant was liable to plaintiff for the amount collected by it on the check. (*Nat. Citizens' Bank v. Citizens' Nat. Bank*, 25 S. E. Rep., 971; 119 N. C., 307.)
- 17 (N. C., 1896). In an action by the drawer to recover the proceeds of a draft collected by a bank the fact that the bank has credited such proceeds to the account of another bank from which the draft was received is no defense where the indorsement thereon showed that the sending bank held it for collection only, the money being subject to the order of the real owner, unless actually paid over to the sending bank before notice of the revocation of its agency. (*Boykin v. Bank of Fayetteville*, (N. C.), 24 S. E., 357; 118 N. C., 567.)
- 18 (N. Y. Sup.). The owner of negotiable paper placed it with a Boston bank to be transmitted to its New York correspondent for collection for the account of the owner, and the Boston bank so instructed the New York bank. *Held*, that the New York bank became the agent of the owner of the paper and was liable to him for negligence in making the collection. (*Kelley v. Phoenix National Bank*, 45 N. Y. S., 533).
- 19 (N. Y.). Where a banker receives a check for collection only, the fact that he causes it to be placed in a correspondent bank, to the credit of his bank, does not make the original owner a creditor of the latter bank, but the proceeds of the check are her property. Judgment 63 N. Y. S., 670, affirmed. (*Blair v. Hill*, 59 N. E. Rep., 1119; 165 N. Y., 672.)

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION—GENERALLY—continued.

- 20 (S. Dak., 1901). Where a bank collects a note for a stranger, and intermingles the money received with its own moneys, and afterwards becomes insolvent, a trust attaches to the money in possession of the bank to pay such note, though no trust attaches to the general assets of the bank, since it is presumed that the bank paid out its own money before embezzling the money of others. (*Plano Mfg. Co. v. Auld*, 86 N. W. Rep., 21; 3 Banking Cases, 419; 14 S. Dak., 512.)
- 21 (Utah, 1899). Defendant had \$1,000 on deposit in plaintiff bank, and, at the request of the cashier, consented that it be loaned through the bank to another of its customers, on condition that the bank would guarantee the loan and collect it for defendant. On such consent being given, defendant was debited in his account with the bank with said sum, and subsequently the cashier arranged with two other customers to continue a loan to them on the payment of a portion thereof, and a note for the balance (\$1,000) was given, payable to the bank. The cashier then represented to defendant that he had made the loan consented to, and had taken said note for it, and, at the suggestion of the cashier, it was left, with other notes of defendant, in the bank for collection, and the cashier gave defendant a receipt for it, which recited that it was held for collection and credit of defendant. Several installments of interest on the note were paid to the bank, and credited to defendant in his account with it. Subsequently the bank collected the note. *Held*, that the proceeds of the note belonged to defendant. (*First Nat. Bank v. Brown*, 57 Pac. Rep., 877; 20 Utah, 85.)

## INDORSEMENTS, WHEN RESTRICTIVE, EFFECT OF.

- 1 (U. S. C. C., 1880). Two bills of exchange, belonging to the plaintiff at Chicago, were indorsed for collection to a bank at Atchison, Kans., and by said Atchison bank to a bank at Kansas City, Mo., and by the latter to defendant, a bank at Hutchinson, Kans. *Held*, that they remain the property of plaintiff, all the indorsements being restrictive. (*First National Bank of Chicago v. Reno County Bank*, 1 McCrary, 491; 3 Fed. Rep., 257.)
- 2 (U. S. C. C., 1880). An indorsement on a bill of exchange directing the drawee to pay to another "on account of" the indorser, or "for collection" is a restrictive indorsement, the effect of which is to restrict the further negotiability of the bill and to give notice that the indorser does not thereby give title to the bill or to its proceeds when collected. (*Ib.*)
- 3 (U. S. C. C., 1880). Although there may be no privity between the owner of the bill and the last indorsee, yet if the latter collects the bill he is bound to pay the proceeds to the owner, and the latter may recover in assumpsit on the ground that the defendant has property in his possession which belongs to the plaintiff and refuses to pay the same over. (*Ib.*)
- 4 (U. S. C. C., 1889). Negotiable paper with restrictive indorsement credited by agent on date of receipt "subject to payment," although account is subject to be drawn upon, title is not transferred, and upon the insolvency of the agent before receiving notice of the collection of the item, the owner is entitled to the proceeds in the hands of the collecting agent. (*Fifth National Bank v. Armstrong*, 40 Fed. Rep., 46.)
- 5 (Md., 1893). The indorsement of a draft to a bank "for collection," accompanied by a credit of the amount to the indorser's account, does not transfer title to the bank, and correspondent of the bank who collects draft for it is responsible therefor to indorser. (*Tyson v. Western National Bank of Baltimore*, 26 Atl. Rep., 520; 77 Md., 423.)

## COLLECTIONS—Continued.

TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER  
FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER.

- 1 (U. S. Sup. Ct., 1895). Where a bank received a draft as agent for plaintiff, of which fact the indorsement was a notice to other banks, it did not thereby become indebted to plaintiff for the amount thereof till after collection and possession of the proceeds, either actually or by settlement with the parties; and defendant bank, to which the draft had been sent by the first bank for collection, could not escape liability to plaintiff by making payment to the first bank, or giving the credit to it on the account between the banks after the first bank had stopped payment. (*Old National Bank of Evansville v. German American National Bank*, 15 S. Ct., 221; 155 U. S., 556.)
- 2 (U. S. Sup. Ct., 1890). A customary depositor in a bank in New York deposited with it a sight draft on a railway company in Boston. It was described as a "check" on the deposit ticket, which distinguished between "checks" and "bills." He had made similar deposits before, never drawing against them, the bank always reserving the right to charge exchange and interest for the time taken in collection. The depositor's bank book was with the bank at the time of the deposit. No entry was made in it until some days later, and then not by direction of the depositor. The receiving teller applied to the cashier for instructions on the receipt of the deposit and was directed to receive it as cash. The bank sent the draft to Boston for collection, and it was collected there. Before that was done, the bank in New York, which was insolvent when the transaction took place, suspended, closed its doors, and never resumed. *Held*, that the question whether the bank had become the owner of the draft, or was only acting as the agent of its customer, was one of fact, rather than of law, and that there was not enough evidence to establish that the customer understood that the bank had become the owner of the paper. (*St. Louis and San Francisco Railway Co. v. Johnston*, 133 U. S. Rep., 566.)
- 3 (U. S. Sup. Ct., 1890). When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds; and the pleadings in this case are so framed as to give the plaintiff in error the benefit of this principle. (*Ib.*)
- 4 (U. S. C. C., 1887). The Winters National Bank sent to the Fidelity Bank a note of \$2,000 for collection and indorsed "Pay Fidelity National Bank, Cincinnati, Ohio, or order, for collection for account of the Winters National Bank, Dayton, Ohio. J. C. Reber, cashier." The Fidelity Bank forwarded it to the Drovers and Mechanics' Bank, which received payment thereof at maturity. Before the Fidelity Bank received notice and remittance of the \$2,000 it became insolvent and went into the hands of a receiver, who took the \$2,000 and credited the Winters Bank therewith. *Held*, that the Fidelity Bank did not own the note, and the Winters Bank was entitled to the full \$2,000 as against the Fidelity Bank's receiver. (*In re Armstrong*, 33 Fed. Rep., 405.)
- 5 (U. S. C. C., 1887). Plaintiff sent to F. bank a draft indorsed "For collection," accompanied with instructions to "collect and credit proceeds." F. bank sent the draft to the defendant and the latter collected it, received the proceeds, and credited them to the F. bank, in accordance with the usual course of business between the F. bank and the defendant, and notified the F. bank of the credit. The F. bank suspended business before crediting plaintiff with the proceeds, but after they had been collected and after it had received notice of the credit. After the suspension of the F. bank the receiver appointed over its affairs credited plaintiff with the proceeds of the draft on the books of the bank. *Held*, that the indorsement "For collection" was

## COLLECTIONS—Continued.

TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER  
FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER—continued.

notice to the defendant of the qualified title of the F. bank, and defendant could not acquire any better title to the draft or the proceeds than that of the F. bank, and could not, as against the plaintiff, apply the proceeds to an account owing the defendant from the F. bank, and that the defendant could only defeat an action brought to recover the proceeds in its hands by showing that the draft or its proceeds belonged to the F. bank. (*First National Bank of Circleville v. Bank of Monroe*, 33 Fed. Rep., 408.)

- 6 (U. S. C. C., 1887). *Held*, further, that the relation of principal and agent continue between the plaintiff and the F. bank so long as the latter did not assume the relation of primary debtor to the plaintiff for the proceeds of the draft; that the plaintiff not having been credited with the proceeds by the F. bank the relation between them remained that of principal and agent, and not debtor and creditor, and that the F. bank, not having credited the plaintiff with the proceeds while it was a going concern, could not, by doing so subsequently, change the existing relation. (*Ib.*)
- 7 (U. S. C. C., 1887). *Held*, in an action brought by the plaintiff against the defendant to recover the proceeds of the draft the defendant, not having remitted the proceeds to the F. bank, was liable to the plaintiff for the amount. (*Ib.*)
- 8 (U. S. C. C., 1890). Plaintiffs sent to a certain bank a bill of exchange indorsed to said bank for collection. At the time the bank received the bill of exchange it was insolvent to the knowledge of the managing officer, and on that day, or following morning, it failed. Prior to the failure it indorsed the bill of exchange to defendant bank, which collected it and kept the proceeds, crediting the insolvent bank, which was indebted to it, with the amount thereof. *Held*, that the first bank acquired no title because of its fraud in not disclosing its insolvency, and defendant had no better title, as plaintiffs' indorsement showed that the bank was merely plaintiffs' agent to collect the proceeds. (*Peck et al. v. First National Bank*, 43 Fed. Rep., 356.)
- 9 (U. S. C. C., 1889). The claimant bank sent to the F. bank a sight draft drawn on a third party, indorsed "pay" F. bank, or order, "for collection for" claimant bank. It was the practice for the F. bank in its dealings with claimant to credit the latter on the day of receipt for all drafts, checks, etc., sent for collection that were payable at sight or on demand, and the balance thus created was subject to be drawn on; but if the paper was not paid it was charged back to claimant. On receipt of the draft the F. bank notified claimant that it had been credited, "subject to payment;" but the credit was not drawn against nor were advances made on the faith of it. Claimant merely kept a memorandum of its transmission for collection. The F. bank sent the draft to its reserve agent, indorsed, for collection, and the amount of it was counted as a part of the F. bank's reserve fund, though this fact was not known to claimant. *Held*, that the indorsement being restrictive, the F. bank acquired no title to it, and that upon the insolvency of the F. bank, before notification of the collection of the draft, the claimant was entitled to the proceeds of it in the hands of the collecting agent. (*Fifth National Bank v. Armstrong, Farmers' National Bank et al., Interpleaders*, 40 Fed. Rep., 46.)
- 10 (U. S. C. C., 1892). A bank which had received a draft for collection sent to its correspondent bank at the residence of the drawee, and the draft was paid to such correspondent. There were no mutual accounts between the two banks, but it was the custom of the correspondent to remit the proceeds of collections at stated periods. *Held*, that until this remittance was made, or the principal bank had given



## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER—continued.

- the original owner of the draft credit for the avails, the original owner of the draft, as the owner of the proceeds thereof, was entitled to recover them from the correspondent bank. (*National Exchange Bank of Dallas v. Beal*, 50 Fed. Rep., 355; affirmed by U. S. C. C. A., 55 Fed. Rep., 894.)
- 11 (U. S. C. C., 1892). Though the correspondent was the agent of the first bank, and payment to it was to that extent a payment to the principal, yet until the proceeds were actually remitted to such principal and mingled with its general funds, or were so credited, the owner of the draft had the option to decline to consider it his debtor and to claim the proceeds in the hands of the agent. (Ib.)
  - 12 (U. S. C. C., 1892). Where the principal fails, and a receiver is appointed, he takes the proceeds of the draft, when remitted to him, subject to the same right of reclamation by the owner that the latter had as against the agent. (Ib.)
  - 13 (U. S. C. C., 1892). Where, in such a case, there are mutual accounts between the two banks, the right of the agent to set off the amount of the collection against the principal's indebtedness to it can not be adjudicated in a suit in equity between the owner of the draft and the principal without making such agent a party. (Ib.)
  - 14 (U. S. C. C. A., 1900). Paper delivered to a bank by a depositor for collection and deposit at a time when its officers knew that it was insolvent, and which had not been collected when the bank closed its doors, remains the property of the depositor, although its indorsement to the bank was without qualification; and on its subsequent collection by the bank examiner its proceeds may be recovered from the bank's receiver, if the funds in his hands have been increased thereby. (*Richardson v. New Orleans Coffee Co., Limited*, 2 Banking Cases, 522; 102 Fed. Rep., 785.)
  - 15 (U. S. C. C., 1888). A draft sent to a bank specially indorsed for collection was paid by the drawee by check, which the bank collected through the clearing house. A memorandum was placed with the bank's cash to indicate that the proceeds of the draft were the property of the sender. The bank was closed next morning, and the receiver credited such proceeds to the sender of the draft on the books of the bank. *Held*, that the fund was not so mingled that it could not be traced and identified, and that the sender could recover the same. (*First National Bank of Montgomery v. Armstrong*, 36 Fed. Rep., 59.)
  - 16 (Cal., 1895). A bank which, upon a draft being deposited with it for collection, refuses to accept it as a deposit, but advances a small amount to the payee on her check, and charges her therewith on its books as an overdraft, and sends it for collection to its correspondent, and, upon receiving notice of its collection, credits the payee's account therewith, is the payee's agent; and the proceeds constitute a trust fund, which the payee is entitled to recover from the receiver. (*Heuderson v. O'Connor*, 39 P., 786; 106 Cal., 385.)
  - 17 (Ill., 1902). Plaintiff held a draft payable to her order drawn on a St. Louis bank, which she indorsed in blank and deposited with a Milwaukee bank for collection. The Milwaukee bank indorsed it and forwarded it to a Chicago bank for collection and credit; and the latter, without crediting it to the Milwaukee bank, forwarded it by mail to its St. Louis correspondent and collected the amount from the drawee and credited the same to the account of the Milwaukee bank, which had in the meantime suspended payment, leaving its account to the Chicago bank overdrawn. The defendant had no knowledge of such suspension when it made the credit, and had at no time notice that the Milwaukee bank merely held the draft for

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER—continued.

collection, and was not its owner. *Held*, that the latter bank could lawfully apply the proceeds of the draft to the overdrawn account of the Milwaukee bank, and was not liable to the original holder of the draft for the amount collected. (*American Exchange National Bank v. Thuemmler*, 4 Banking Cases, 303; 195 Ill., 90.)

- 18 (Ky.). A bank which has received a check for collection is not made liable to the drawee for its amount by the fact that, upon protest of the check for nonpayment, it has accepted from the maker thereof a check upon another bank, payable to the order of its cashier, the drawee of the first check being absent from the city, which latter check is also protested for nonpayment. (*Citizens' Bank v. Houston*, 32 S. W., 397; 98 Ky., 139.)
- 19 (Mass., 1889). A national bank became the agent of plaintiff bank to collect its checks and drafts under an arrangement by which no debt was created from the agent to the principal on account of checks received for collection until such checks were paid. *Held*, that a right which the agent had, when such checks were collected, of mingling the proceeds with its own money and making itself the debtor of the plaintiff therefor terminated when it became insolvent; that where a check belonging to plaintiff and indorsed "for collection" for plaintiff was sent by the agent to the defendant bank, which collected it after the agent had closed its doors, the defendant was liable to the plaintiff for the proceeds of such check. (*Manufacturers' National Bank v. Continental Bank et al.*, 20 N. E., 193; 148 Mass., 553.)
- 20 (Mich., 1895). Where a mortgage is sent to a bank for collection, with direction to remit, the relation of creditor and debtor is not established between the sender and the bank, where the latter fails to remit, and therefore, on the insolvency of the bank, a trust will be imposed on its assets in favor of the sender as against general creditors of the bank. (*Wallace v. Stone*, 65 N. W., 113; 107 Mich., 190.)
- 21 (Mo.). Where a note was left with a bank for collection and remittance, and the bank collected the note, but failed to make the remittance, on failure of the bank the assignee will be required to pay the amount of the collection in full. (*German Ins. Co. of Freeport v. Kimble*, 2 Mo. App. Rep., 1333.)
- 22 (Mo.). Where a bank collected a certificate of deposit given it for collection, and afterwards, without paying over the proceeds, made an assignment for the benefit of creditors, the assigned property is impressed with a trust in favor of the owner of the collection, entitling him, in equity, to a priority over general creditors. (*First Nat. Bank v. Sanford*, 62 Mo. App., 394.)
- 23 (Nebr., 1897). That the correspondent has credited the account of the remitting bank with the proceeds of the collection does not preclude the owner from recovering such proceeds of the correspondent upon the insolvency of the remitting bank. (*Branch v. United States National Bank*, 70 N. W., 34; 50 Nebr., 470.)
- 24 (N. C., 1896). That a check deposited with a bank for collection was unrestrictedly indorsed to the bank and credit therefor given the depositor does not pass the title to the bank where, on nonpayment of the check, its amount was to be charged up to the depositor so as to prevent its recovery by the depositor from a receiver appointed for the bank. (*Armour Packing Co. v. Davis*, 24 S. E., 365; 118 N. C., 548.)
- 25 (N. Y. Sup., 1884). Where one deposits a draft with a national bank and the bank sends it to an agent for collection, who collects it, and the bank fails before receiving the avails, having been insolvent at the time of the deposit, the depositor may rescind the transaction for

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER—continued.

- fraud and recover the avails from the agent. (*Craigie v. Smith*, 14 Abb. N. C., 409; 3 N. B. C., 679.)
- 26 (N. Y.). The drawers of a draft deposited with a bank for collection, and by it forwarded to a correspondent bank, are entitled to the amount as against the receiver of the forwarding bank, which was insolvent and known to be so by its officers when it received the draft, and suspended payment before the proceeds were withdrawn from the collecting bank. (*Importers and Traders' National Bank v. Peters et al.*, 123 N. Y., 272.)
- 27 (N. Y.). A bank holding a note for collection from one not a depositor, and which receives payment thereof by charging to the account of a depositor having sufficient to his credit to meet it, does not become thereby a debtor of the owner of the note, but holds the amount of the collection in trust for him; such trust being impressed on all the funds of the bank, which may be followed though they pass into the hands of a receiver. (*People v. Merchants' Bank* (Sup.), 36 N. Y. S., 989; *In re Friend*, ib.)
- 28 (Tex., 1894). Plaintiff sent a draft to a bank for collection. The bank collected it and then passed into the hands of a receiver without remitting. The bank had previously made similar collections for plaintiff, the proceeds of which were always remitted to him promptly and never credited to him as a deposit. *Held*, that plaintiff was entitled to be paid the entire proceeds of the draft out of the bank assets in the receiver's hands, since the bank was his trustee and not his debtor. (*Hunt v. Townsend*, 26 S. W., 310.)
- Conversion by first bank gives holder no preference.*
- 29 (U. S. C. C., 1889). Plaintiff sent to defendant's bank paper indorsed "for collection and immediate return" to plaintiff, and the paper was collected and the proceeds mingled with other moneys of the bank, instead of forwarded to plaintiff. The bill contained an uncontroverted allegation that defendant's bank, at all times subsequent to the collection and at the time of defendant's appointment as receiver, had on hand cash to a greater amount than that due plaintiff. The bill asked to have the balance due plaintiff paid in full, on the ground that the bank by receiving the paper for collection and immediate return became a trustee, and that either its entire property or the money in its vaults became impressed with the trust. *Held*, that if the mingling of the funds was a breach of trust it was a conversion, and plaintiff became a simple contract creditor, with no preference at law. (*Philadelphia National Bank v. Dowd*, 38 Fed. Rep., 172.)
- 30 (U. S. C. C., 1889). It was immaterial whether or not the bank stood in a fiduciary capacity to plaintiff, as the facts stated in the bill showed that the money collected could not be traced into any specific investment or fund, but had been indistinguishably mingled with the general assets. (Ib.)
- 31 (Ind.). A claim to a preference in the assets in the hands of an assignee of an insolvent bank, on account of moneys collected by the bank for the claimant and not paid over to him, is not established in the absence of evidence as to what was done with them, although if they had been deposited in the bank and commingled with other moneys, or had gone into other properties represented by the assets the claimant would be entitled to a preference. (*Winstandley et al. v. The Second Nat. Bank of Louisville, Ky.*, 13 Ind. App., 544.)
- 32 (Kans., 1896). When money is paid to and accepted by a bank for the purpose of transmission to the holder of a note made by the person so paying and is mingled by the bank with its assets, and is not transmitted, and the bank thereafter assigns for the benefit of its

## COLLECTIONS—Continued.

TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER  
FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT BEFORE PROPERLY CREDITING HOLDER—continued.

creditors, if the holder of the note adopts the trust thereby created in his favor, and no other rights thereto intervene, he may maintain an action to enforce the execution of the trust by the assignee of the bank. (*Ryan v. Phillips*, 44 Pac. Rep., 909; 3 Kans. App., 704.)

## WHEN FIRST BANK INSOLVENT AFTER PROPERLY CREDITING HOLDER.

- 1 (U. S. C. C., 1889). By agreement and custom the Fidelity Bank received drafts from its correspondent bank at E., and credited them to it as cash, with the understanding that any draft which was unpaid should be charged back to the correspondent. The latter forwarded drafts, which were credited to it, but were not collected before the Fidelity Bank failed. The drafts were paid after the appointment of a receiver and the moneys actually came into his hands. The drafts were indorsed payable to the Fidelity Bank "for collection" for the bank at E. *Held*, that as the drafts were, when received, credited as cash to the bank at E., which had the right at once to draw against them, the indorsement for collection did not affect the result, and the bank had only the rights of a general creditor. (*First National Bank of Elkhart v. Armstrong*, 39 Fed. Rep., 231.)
- 2 (U. S. C. C., 1890). Checks and drafts sent from one bank to another were indorsed "for collection," and credited "subject to payment," according to the dealings between the banks. Part of them were paid to the receiver of the latter bank after its failure, and the balance were credited to it by the payors. *Held*, that the amount paid the receiver should be accounted for as a trust fund, but the balance as a general debt. (*First National Bank of Wellston v. Armstrong*, 42 Fed. Rep., 193.)
- 3 (U. S. C. C., 1892). Where plaintiff and defendant banks for several years had acted as agents for each other in the collection of checks, notes, and drafts (the practice being for each to credit the other for checks when received and for drafts and notes when advised of their payment, charging the amount back again if it was returned unpaid), and where plaintiff sent defendant a note "for collection and credit" which on maturity was paid by a check and credit was immediately given on the books, but defendant failed and the check passed into the hands of a receiver. *Held*, that in view of the course of dealing the two banks stood in the relation of debtor and creditor with respect to the amount of the check, and it became part of the assets of the bank. (*Franklin County National Bank v. Beal*, 49 Fed. Rep., 606.)
- 4 (U. S. C. C. A., 1892). A city treasurer deposited checks in a bank, indorsed by him "For deposit," and the checks were immediately credited to him on his pass book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash or that he should draw against them before collection. The bank became insolvent before the checks were collected and their proceeds passed into the hands of a receiver. *Held*, that no title passed to the bank except as a bailee and that the depositor was entitled to the proceeds. (*Beal, Receiver, v. City of Somerville*, 50 Fed. Rep., 647.)
- 5 (U. S. C. C., 1899). Where a Philadelphia bank, being indebted to a New York bank for collections made, remitted by its cashier's check on another New York bank with which it had a sufficient deposit, which check was duly presented and paid through the clearing house, the transaction amounted to a complete appropriation of the fund to the creditor bank, and its ownership is not affected by the restoration by it of the money to the bank paying the check on the same day, on

## COLLECTIONS—Continued.

TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER  
FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT AFTER PROPERLY CREDITING HOLDER—continued.

the demand of the latter, made on learning of the suspension of the drawer, which return was required under such circumstances by the rules of the clearing house, of which both banks were members, but only for the purpose of protecting the paying bank in case the payment should prove to be unauthorized; nor will the fact that such bank, without right, paid the money to the receiver of the insolvent bank prevent its recovery from the receiver by the payee of the check. (*National Union Bank v. Earle*, 93 Fed. Rep., 330.)

- 6 (Ind., 1899). The usual and ordinary custom by which banks are generally controlled in collecting paper does not require them to hold the money collected separate and apart from their own funds and remit the identical money collected. And when the money is collected, and the proper credit given to the person by whom the paper was sent for collection, as a general rule the relation of debtor and creditor is created between the bank and such person, and the relation of trustee and cestui que trust does not arise. And the fact that the bank is insolvent when the proceeds of the paper are mingled with its own funds are immaterial in this connection, if its officers are not aware of its insolvency. (*Union Nat. Bank v. Citizens' Bank of Union City et al.*, 1 Banking Cases, 712; 153 Ind., 44.)
- 7 (Kans., 1901). Where a check is sent to a bank for collection, and such bank, after collection, retains and uses the proceeds of the check in its general business, it will be deemed to be an agent and trustee of the owner of the check, and the money so wrongfully retained and used to be a trust fund which the owner may follow and claim if it can be identified and the rights of no innocent third parties have intervened. (*Kansas State Bank v. First State Bank of Marion et al.*, 64 Pac. Rep., 634; 3 Banking Cases, 413; 62 Kans., 788.)
- 8 (Minn., 1898). A customer kept an account with a bank, which received his deposits, consisting of checks, with the understanding that the checks should be credited to his account, and, if not paid on presentation, should be charged back. *Held*, that the title to the checks passed to the bank, subject to the condition that credit should be rescinded if the checks were not paid on presentation, and that the failure of the bank after it had received certain checks, but before they were collected, did not divest its title. (In re Receivership of Washington Bank, 75 N. W. Rep., 228; 72 Minn., 283; *Brusegard v. Ueland*; Id.)
- 9 (Mo., 1899). Where a bank accepts a check on another bank in payment of a draft in its hands for collection, and gives up the draft, it makes the check its own, and its liability is the same as if cash had been received. (*National Bank of Commerce v. American Exch. Bank of St. Louis*, 52 S. W. Rep., 265; 151 Mo., 320.)
- 10 (Nebr., 1897). Where the uniform course of business between two banks showed that the real import of the indorsement of a certificate of deposit by one bank to the other was to pass the certificate, not for the sole purpose of collection, but as the property of the transferee, it will be treated as having that effect, though the form of the transmitting letter tends to show a remittance for collection, it being admitted that all classes of paper were remitted under this same form, and that they were differently treated thereunder. (*United States Nat. Bank v. Greer*, 73 N. W. Rep., 266; 53 Nebr., 67.)
- 11 (Nebr., 1897). A depositor tendered to a bank a draft made by him payable to its order, saying that his outstanding checks would overdraw his account, and that he wished credit for the draft. The bank took the draft and agreed to give him credit for it and to protect his checks, but told him if it should not be paid he would "be overdrawn

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT AFTER PROPERLY CREDITING HOLDER—continued.

- just the same." On that day the bank honored his checks for more than one-half the amount, and two days later the bank, which was then insolvent, and so known by its officers to be, closed its doors. *Held*, that the draft became the property of the bank, and was not intrusted to it for the sole purpose of collection. (Ib.)
- 12 (Nebr., 1901). Money collected by a bank for another on notes or drafts, and retained, is held in trust for the owner and does not become a part of the assets of the bank, and if the bank thereafter becomes insolvent, and a receiver is appointed, the one from whom the collection is made is a preferred creditor. (*State v. Bank of Commerce of Grand Island et al.*, 85 N. W. Rep., 43; 3 Banking Cases, 46; 61 Nebr., 181.)
- 13 (N.Y.). Where the owner of a note sends it to a bank for collection only, and the maker's check is drawn on that bank for the amount thereof, and is delivered to it, and the note is thereupon canceled and surrendered, and the check is charged to the account of the maker, which was good for the amount, there is a collection of the amount from the general fund of the bank and a special appropriation of that amount to the payment of the note, and as between the owner of the note and the receiver of the bank the title to the money dedicated to the payment of the note remains in the owner. (*Arnot v. Bingham*, 9 N. Y. S., 68; 55 Hun., 553.)
- 14 (N. Y., 1900). Defendant received from plaintiff, one of its depositors, an indorsed draft for collection, and forwarded it to its agent, where the drawee resided, and on November 3 received in payment a check of the drawee on a local bank, and immediately gave plaintiff credit for the amount. The fact that plaintiff, after protest of the check, aided the bank in its effort to procure payment of the check by the indorser of the draft, did not estop plaintiff from enforcing the liability of the bank for its negligence in not returning the check. (*Kirkham v. Bank of America*, 58 N. E. Rep., 753; 3 Banking Cases, 56; 165 N. Y., 132.)
- 15 (N. C., 1894). Under an agreement between plaintiff bank and the H. bank that the latter should collect notes and checks forwarded it by plaintiff for a commission and remit daily, the relation of principal and agent as to any paper ceased on collection, and the relation of creditor and debtor as to cash immediately arose. (*First National Bank of Richmond v. Davis*, 19 S. E., 280; 114 N. C., 343.)
- 16 (N. C., 1894). On failure of the H. bank, it being shown that its cashier had no knowledge of its insolvency till the failure, it is not chargeable as for a conversion of funds of plaintiff which it has mingled with its own funds, since, in the absence of such knowledge on the cashier's part, the contract, with its necessary implication as to the disposition to be made of plaintiff's money on collection, remained in force till the failure. (Ib.)
- 17 (S. Dak., 1901). Where for two years the general agent of a corporation had been accustomed to send notes due the corporation to a bank for collection, and the bank, as it collected the notes at different times, gave the agent credit on its books, sometimes retaining the collections as long as two months before remitting the balance due the corporation, the corporation was merely a creditor of the bank, and the proceeds of collections made by it could not be regarded as trust funds. (*McCormick Harvesting Mach. Co. v. Yankton Sav. Bank et al.*, 87 N. W. Rep., 974; 4 Banking Cases, 81; 15 S. Dak., 196.)
- 18 (Wash., 1898). Only the usual relation of debtor and creditor, and not that of trustee and cestui que trust, exists between a bank which has collected a draft and the person who left the draft for collection, though there was no contract for deposit of the proceeds; so that,

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN FIRST BANK INSOLVENT AFTER PROPERLY CREDITING HOLDER—continued.

the bank becoming insolvent, such person is not entitled to preference. (*Hallam v. Tillinghast*, 52 Pac. Rep., 329; 19 Wash., 20.)

## WHEN CORRESPONDENT BANK PROPERLY CREDITS HOLDER BEFORE INSOLVENCY.

- 1 (U. S. Sup. Ct., 1892). A bank in Ohio contracted with a bank in Pennsylvania to collect for it at par, at all points of Pennsylvania, and remit the 1st, 11th, and 21st of each month. In executing this agreement the Pennsylvania bank stamped upon the paper forwarded for collection, with a stamp prepared for it by the Ohio bank, an indorsement "Pay to" the Ohio bank, "or order, for collection for" the Pennsylvania bank. The Ohio bank failed, having in its hands, or in the hands of other banks to which it had been sent for collection, proceeds of paper sent it by the Pennsylvania bank for collection. A receiver being appointed, the Pennsylvania bank brought this action to recover such proceeds. *Held*, first, that the relation between the banks as to uncollected paper was that of principal and agent, and that the mere fact that the subagent of the Ohio bank had collected the money due on such paper was not a commingling of those collections with the general funds of the Ohio bank, and did not operate to relieve them from the trust obligation created by the agency, or create any difficulty in specially tracing them.

Second, that if the Ohio bank was indebted to its subagent, and the collections when made were entered in their books as a credit to such indebtedness, they were thereby reduced to possession and passed into the general funds of the Ohio bank.

Third, that by the terms of the agreement the relation of debtor and creditor was created when the collections were fully made, the funds being on general deposit with the Ohio bank, with the right in that bank to their use until the time of remittance should arrive. (*Commercial National Bank of Pennsylvania v. Armstrong*, 148 U. S., 50.)

- 2 (U. S. C. C. A., 1893). Where a check of a depositor is accepted by a correspondent bank in payment of a draft for collection, which charges the same to the drawee and credits the drawer without separating the amount from its general fund, it holds the money as agent for the drawer, who, after insolvency, becomes a mere general creditor, notwithstanding the State constitution provides that "depositors who have not stipulated for interest shall for such deposits be entitled in case of insolvency to preference of payment over all other creditors." (*Anheuser-Busch Brewing Association v. Clayton*, 56 Fed. Rep., 759.)
- 3 (U. S. C. C., 1891). A bank which collects a draft sent to it by another bank for that purpose, with directions to remit the proceeds to a third bank for the owner's account, does not thereby become a trustee, so that the fund can be followed into the hands of a receiver, although it had become mixed with the other cash of the bank before his appointment; especially when it appears that the business was carried on, and money paid out, for several days after the collection was probably made. (*Merchants and Farmers' Bank v. Austin et al.*, 48 Fed. Rep., 25.)
- 4 (U. S. C. C. A., 1899). Checks were sent to a bank by depositors for the purpose of having them collected and the proceeds placed to their credit; and they were received and placed to their credit when the bank officers knew that it was insolvent, and when the depositors were not indebted to the bank. *Held*, that the action of the bank in so receiving the checks at such time was such a fraud upon the depositors as gave them the right to recover the checks from the bank's receiver. (*Richardson v. Denegre et al.*, 1 Banking Cases, 503; 93 Fed. Rep., 572.)

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN CORRESPONDENT BANK PROPERLY CREDITS HOLDER BEFORE INSOLVENCY—cont'd.

- 5 (Ark.). Where a bank forwarded a note to a correspondent for collection, and the latter, which had the maker's money on deposit, with instructions to pay it on the note, charged the amount to the maker, and credited it to the sender of the note in the usual course of business, it constitutes a payment, though the bank failed the next day, and returned the note without indorsing anything thereon, or accounting for the collection. (*Daniel v. St. Louis Nat. Bank*, 54 S. W. Rep., 214; 67 Ark., 223.)
- 6 (Mich., 1898). The F. bank, which sent to the M. bank, for collection, a number of checks on the latter, has no right to preference, on the M. bank becoming insolvent, the M. bank having received no money on the checks, but merely charged them on its books against the drawers. (*Sunderlin v. Mecosta County Sav. Bank*, 74 N. W. Rep., 478; 116 Mich., 281.)
- 7 (Mo., 1899). The plaintiff bank sent items to another bank for collection, and they were collected by the latter bank by charging the accounts of certain of its depositors, with their consent, and crediting plaintiff therewith, at a time when the collecting bank had no funds on hand, except a small amount, not a dollar of which had been received from the depositors owing the collections. Plaintiff had not received payment for any portion of such collection items when the collecting bank became insolvent and assigned. *Held*, that plaintiff was not entitled to a preference over general creditors on account of such collections, it not appearing that the assets in the hands of the assignee had been augmented thereby. (*Midland Nat. Bank of Kansas City v. Brightwell* (Mo. App.), 1 Banking Cases, 379.)
- 8 (Nebr., 1898). Plaintiff bank transmitted to defendant bank for collection, and so indorsed, a note payable at a third bank. Defendant indorsed the note for collection and forwarded it to the third bank with a letter instructing the latter bank, after making the collection, to credit the same to defendant, with whom said third bank had a running account. The note was collected and the proceeds credited to defendant, and on the same day the collecting bank failed, being at the time overdrawn with the defendant. *Held*, that defendant was liable to plaintiff for the amount of the note. (*First Nat. Bank of Omaha v. First National Bank of Moline*, 75 N. W. Rep., 843; 55 Nebr., 303.)
- 9 (Okla., 1900). Where a bank, in the due course of business, receives from a correspondent bank a check indorsed in blank, and in good faith parts with value or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check against the real owner, even though the check was not actually collected by such bank until after failure of the bank which transmitted the same to it. (*Winfield Nat. Bank v. McWilliams*, 2 Banking Cases, 277; 9 Okla., 493.)
- 10 (Pa., 1894). A bank received two drafts indorsed to it for collection, on account of the drawers, against two of its depositors. After acceptance by the latter the bank charged to each depositor's account the amount of the draft accepted by him. Before remitting to the drawers the bank assigned, having on hand cash sufficient to pay such drafts. *Held*, that the drawers were not entitled to a preference as to the funds on hand at the time the bank failed, where the assignee holds nothing which he or such drawers can identify with the drafts or trace as a payment of them. (*Freiberg v. Stoddard*, 28 Atl. Rep., 1111; 161 Pa. St., 259.)
- 11 (Wash., 1894). B. forwarded to bank a draft for collection. On July 22, 1893, bank made collection, and the same day forwarded its draft on New York. On July 26 bank failed, and a receiver was appointed.



COLLECTIONS—Continued.

TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

WHEN CORRESPONDENT BANK PROPERLY CREDITS HOLDER BEFORE INSOLVENCY—cont'd.

Draft was presented after the failure and payment refused. B. brought suit to secure a preference in payment. *Held*, that when a draft is forwarded to a bank for collection, in the absence of instructions to the contrary, it is with the understanding that upon collection the title to the proceeds shall vest in the collecting bank, and that said bank shall remit to its correspondent the equivalent of such proceeds by the system of exchanges established by the universal custom among banks, and when this has been done no preference can arise. (*Bowman et al. v. Clark et al.*, 38 P., 211; 9 Wash., 614.)

WHEN CORRESPONDENT BANK INSOLVENT BEFORE HOLDER PROPERLY CREDITED.

- 1 (U. S. C. C. A., 1893). Where a bank sends paper to another bank for collection and credit on general account, the custom being to enter credit only when paper is collected, the relation being that of principal and agent until collection and receipt of money by the second bank, and if latter sends to another bank, which collects, but does not remit until latter bank has failed, the former can recover the proceeds from the receiver thereof. (*Beal v. National Exchange Bank of Dallas*, 55 Fed. Rep., 894.)
- 2 (U. S. C. C. A., 1899). In answer to letters soliciting an account and making an offer of services for the care of business in its neighborhood, a bank wrote, "If we understand your position, you agree that you will take from us all items on (neighboring States), crediting your account with the total of our letter on receipt at par, and remitting New York at par the year round on our balance in excess of \$10,000." The correspondent was directed to advise of collections by the collection number of the remitting bank, so that they could be checked without difficulty. Each letter of advice contained the passage: "I inclose for collection and \* \* \*. Please advise collection by number, and return immediately if not honored." The list of items often directed protests, which directions were followed, and immediately on such protest the amount of such item and protest fees were charged back to remitting bank. Some items were charged with the note "*Held*," probably meaning held for future direction. Of many of the items the remitting bank was the mere mandatary for collection. *Held*, that the contract was one for the collection of the items forwarded, and not of purchase, and the forwarding bank was entitled to all items not collected before suspension of the collecting bank, and afterwards collected by subagents, and traced to the possession of the receiver appointed to wind it up. (*Richardson v. Louisville Banking Co.*, of Louisville, Ky., 94 Fed. Rep., 442.)
- 3 (U. S. C. C. A., 1899). A bank entered into an agreement to "handle" the business of another bank within a specified territory, and, pursuant thereto, certain items of exchange were transmitted to it, indorsed payable to the order of any national or State bank, which were credited to the account of the transmitting bank. *Held*, that the receiving bank was not the purchaser of such items of exchange, nor did it become the debtor of the transmitting bank by so crediting the items; and that the latter was entitled to the possession of all such items uncollected at the time of the failure of the receiving bank, or their proceeds, which could be identified in the hands of the receiver. (*Richardson v. Continental Nat. Bank of Memphis, Tenn.*, 2 Banking Cases, 438; 94 Fed. Rep., 450.)
- 4 (Mont., 1899). The defendant bank received from plaintiff a draft deposited by him with directions to collect and notify plaintiff and not for credit. A receiver was appointed for defendant before plaintiff was paid any part of the amount of the draft. Defendant was not indebted to its correspondent at the time the latter collected the draft.

## COLLECTIONS—Continued.

## TITLE TO CLAIMS DEPOSITED WITH BANK FOR COLLECTION AND LIABILITY OF HOLDER FOR PROCEEDS—continued.

## WHEN CORRESPONDENT BANK INSOLVENT BEFORE HOLDER PROPERLY CREDITED—cont'd.

and did not become indebted to it subsequently, and the balance paid by the correspondent into the hands of the receiver exceeded the amount of the draft. *Held*, that the fact that plaintiff, when he deposited the draft, had an open account with defendant subject to check did not change the bank's relation to defendant from that of agent to that of debtor in regard to the draft, whether or not the amount of the draft was credited to plaintiff on defendant's books. (*Guignon v. First Nat. Bank of Helena et al.*, 1 Banking Cases, 290; 22 Mont., 140.)

- 5 (Wyo., 1894). A national bank collected a note for plaintiff by accepting a draft for the amount on another party, which it forwarded to its correspondent for collection, and at the same time sent plaintiff a draft on the same correspondent as a remittance of the proceeds of his note. The correspondent received the money on the draft sent it for collection, but before plaintiff's draft was paid by the correspondent the bank failed. *Held*, that the bank was only agent for plaintiff, and that the money derived from his note was a trust fund, which did not become a part of the bank's assets. (*Foster v. Rincker*, 35 P., 470; 4 Wyo., 484.)

## NEGLECTANCE IN MAKING COLLECTIONS.

## GENERALLY.

*National banks liable for negligence in making collections.*

- 1 (Utah). Collecting commercial paper is part of the regular business of banking, and a national bank will be liable for negligence in collecting a draft the same as any other bank or agent. (*Mound City Paint and Color Co. v. Commercial National Bank*, 9 P., 709; 4 Utah, 353.)

*Negligence in loss of draft.*

- 2 (Cal.). In an action against a bank for the loss of a draft left with it for collection the bank should be permitted to show that it acted in the matter according to the usage of banks. (*Davis v. First Nat. Bank*, 50 Pac. Rep., 666; 118 Cal., 600.)

*Negligence in sending collections by mail.*

- 3 (Mo.). A bank receiving paper for collection payable at a distant place, and sending it by mail to the payor for collection, is guilty of negligence, though the payor is the only bank in the place and though it is customary to send paper in that manner for collection. (*American Exchange Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App., 451.)

*Bank must exercise due care.*

- 4 (Minn., 1902). Plaintiff was defendant's agent for the collection of the check, and was bound to exercise reasonable care and diligence to protect all the rights of defendant in respect to the liability of the indorser and drawer thereof; and a failure to exercise such care released defendant from liability to plaintiff. (*Ft. Dearborn Nat. Bank v. Security Bank of Renville*, 91 N. W. Rep., 257; 4 Banking Cases, 665; 87 Minn., 81.)
- 5 (Minn., 1902). The measure of damages in such case is, prima facie, the face value of the check, subject to reduction and mitigation, however, by a showing of insolvency of the person discharged from liability, or other fact showing no damages in point of fact. Solvency is ordinarily presumed, and the burden is upon him who asserts the contrary to prove it. (*Ib.*)
- 6 (N. Dak., 1899). A note was sent to a bank for collection. The maker was a stockholder and director of the bank, and the bank knew that he was largely in debt and would not be able to pay his obligations

## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## GENERALLY—continued.

if pressed by all his creditors. For many weeks after the note reached the bank the debtor had an unencumbered stock of goods in his store, which was worth \$2,500, and also real estate partially unencumbered. The bank did not inform its principal of the facts, but withheld information for a long time after maturity of note, and replied only in answer to a telegram of inquiry. In the meantime the bank obtained security from the maker to protect its own claims. *Held*, that the bank is liable to its principal for negligence. (Commercial Bank v. Red River Val. Nat. Bank, 79 N. W. Rep., 859; 8 N. Dak., 382.)

*Collection of drafts—Measure of duty—Ordinary care.*

- 7 (U. S. C. C., 1903). Where drafts are sent from one bank to another for collection and remittance, the measure of duty of the collecting bank is the exercise of ordinary care and reasonable diligence. (Bank of Bay Biscayne, of Miami, Fla., v. Monongahela National Bank, 126 Fed. Rep., 436.)

## NEGLECTANCE IN PRESENTATION.

- 1 (Ga.). When a bill of exchange, payable at ———, was sent to a bank for collection, and the bank, treating it as a bank check and not entitled to days of grace, presented it for payment, and had it protested, etc., on the day of its maturity, without days of grace, by means of which the indorser was discharged, and it was in evidence that the bank was notified by the indorser at the time that he claimed the paper to have days of grace, *held*, that the bank was liable to the person who deposited the paper for collection for damages for its negligence in not presenting the check, as required by law, and causing notice of its nonpayment to be given to the indorser. (The Georgia National Bank v. Henderson, 46 Ga., 487.)
- 2 (Ind., 1898). Where the drawer of a draft, by reason of having no funds in the drawee's hands or no right to draw, remains liable on his indorsement of the draft without presentment, demand, or notice, a bank to which the draft is transmitted for collection, by negligence in presenting the same for acceptance, becomes liable only for nominal damages, unless the drawer has become insolvent since the time at which the indorsee would have received notice of the nonacceptance had the draft been presented at the proper time, in which case it may become liable for the loss occasioned by its negligence. (Citizens' Nat. Bank v. Third Nat. Bank, 49 N. E. Rep., 171; 19 Ind. App., 69.)
- 3 (Ind., 1898). The fact that a bona fide indorsee of a draft did not inquire whether the drawer had the right to draw or had reason to expect it to be paid will not excuse the bank which undertook to collect the draft from presenting it for acceptance. (Ib.)
- 4 (Kans., 1901). It is the duty of a bank receiving commercial paper for collection before it is due to present same to the maker for payment on its maturity, and, if payment is refused, immediately to notify the holder. In a case where the duty to give such notice was neglected and the bank, after the maturity of the note and while holding it for collection, took from the maker a chattel mortgage to itself and assisted another creditor to obtain a mortgage covering all the debtor's property, by reason of which the note was rendered uncollectible, it was error for the court to take from the jury the question of the bank's liability for the amount of the note. (Sprague et al. v. Farmers' Nat. Bank of Arkansas City et al., 64 Pac. Rep., 967; 3 Banking Cases, 449; 63 Kans., 12.)
- 5 (Md., 1894). The payee of a check deposited it for collection with bank A on the same day it was made. The bank presented it for payment the next day shortly before 11 o'clock, and the drawee's check on

## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## NEGLECTANCE IN PRESENTATION—continued.

bank B, only a few blocks distant, was taken in payment. The drawee became a bankrupt at 1 o'clock. Several checks given after this, one by the drawee on bank B, were paid before 1 o'clock. Before 3 o'clock bank A presented the check in question for payment, which was refused; whereupon it immediately went to the drawee, and, after recovering the original check, protested it. *Held*, that the drawer of the check was not liable thereon. (*Anderson v. Gill*, 29 A., 527; 79 Md., 312.)

- 6 (Mo.). In an action against a collecting bank for failure to present a draft for payment, since no pecuniary benefit could have been realized by the defendant, the measure of damages is the face value of the draft, without interest. (*Gray's Harbor Commercial Co. v. Continental Nat. Bank*, 74 Mo. App., 633.)
- 7 (Nebr., 1898). The custom of two banks at a certain town to hold collections at the request of debtors and unknown to the parties drawing on them is not a defense to a bank in an action for the negligent holding of a draft unpaid. (*Dern v. Kellogg*, 74 N. W. Rep., 844; 54 Nebr., 560.)
- 8 (Nebr., 1898). A bank received a draft for collection February 19, presented it and secured an oral acceptance and a promise that it would be paid in a few days. At maturity the merchant asked the bank to hold it, and repeated his promise to pay in a few days. The same thing occurred later. The bank held the draft without communicating with the drawers until March 5, when, at the request of the merchant, it wrote the drawers requesting an extension of thirty days. March 7, and before an answer was received, it took a conveyance of all the merchant's property in satisfaction of a debt to itself, and with an agreement to pay debts to strangers to a large amount, but not including the drawers of the draft. It then returned the draft, which could not be collected. *Held*, that it had not performed its duties in good faith and was liable. (*Ib.*)
- 9 (Nebr., 1901). If the payee of a check drawn upon a bank in this State indorses and delivers it to a bank in a neighboring town for collection and accompanies the act with a request that it be not immediately presented for payment, and agrees that it may be sent for collection through a distant bank, situate outside the State, the indorsee will not be liable for the consequences of the delay necessarily incident to the course adopted nor for the default or negligence of the bank chosen to make presentment for payment. (*Bedell v. Harbine Bank of Fairbury*, 86 N. W. Rep., 1060; 3 Banking Cases, 678; 62 Nebr., 339.)
- 10 (Nebr., 1901). If the payee of a check drawn upon a bank in this State indorses it to a bank in a neighboring town for collection, and the latter, without the knowledge or consent of the payee, sends it for collection through a distant bank, situate outside the State, thereby consuming three days in making a presentment for payment which might have been made in one day, the indorsee will be liable for the consequences of such delay and for any default or negligence of the bank chosen to make the collection. (*Ib.*)
- 11 (N. Y., 1900). It is the duty of a bank, receiving from a customer a draft drawn by a third party, to present it for payment, and it is liable for loss caused by acts of its agents in making the collection. (*Kirkham v. Bank of America*, 49 N. Y. S., 767.)
- 12 (N. Y., 1899). Where the failure of a bank receiving a check for collection to present it for payment within a reasonable time is the cause of the loss of money, an indorser paying the check without knowledge of the bank's negligence can recover the amount from the latter. (*Martin et al. v. Home Bank*, 2 Banking Cases, 112; 160 N. Y. St., 190.)

## COLLECTIONS—Continued.

## NEGLIGENCE IN MAKING COLLECTIONS—continued.

## NEGLIGENCE IN PRESENTATION—continued.

- 13 (Pa.). Defendant bank received for collection a draft drawn on plaintiff, payable at another bank where he had funds and had left instructions to meet it. Defendant negligently failed to present the draft until the failure of the bank at which it was payable, so that plaintiff became discharged from liability thereon. *Held*, that plaintiff could not recover back the amount of the draft paid by him to defendant with knowledge of the facts, although he made the payment under protest and to save his credit. (*Harvey v. Girard National Bank, Pa.*, 13 A., 202; 119 Pa. St., 212.)

## DUTY OF BANK TO TAKE PROPER STEPS TO CHARGE INDORSER AND LIABILITY FOR FAILURE TO TAKE PROPER ACTION.

*Duty of bank to take proper steps to charge indorser.*

- 1 (Ala., 1899). A bank received a draft from the drawer for collection and upon presenting it for payment received from the drawee his check for the amount of the draft drawn on another bank of the same town in which it was located. *Held*, that, as between itself and the drawer of the check, the bank had until the close of banking hours on the next secular day after receiving the check to present it to the drawee bank for payment—the time allowed by commercial law, as the bank in presenting the check was not the agent of the drawer. (*Morris v. Eufaula Nat. Bank*, 1 Banking Cases, 677; 122 Ala., 580.)
- 2 (Minn.). A bank receiving an indorsed note before maturity for collection is required to take the proper steps to fix the liability of the indorser. (*West v. St. Paul National Bank*, 56 N. W., 54; 54 Minn., 466.)
- 3 (Minn.). In an action by the owner of the note for neglect of that duty, resulting in the discharge of the indorser, the question of the solvency of the maker is material as affecting the measure of damages. (Ib.)
- 4 (Minn.). Insolvency may be shown prima facie by proof of general reputation. Proof of insolvency within a reasonable time after the maturity of the note held admissible. (Ib.)
- 5 (Mo.). The town of S. was situated on the same railroad, 12 miles beyond the town of M. A bank at K. received a check on a bank at S. for collection, and on account of the suspected insolvency of its correspondent, the only other bank at S., transmitted the check to a bank at M., where it was received on Saturday, on which day the bank at S. became insolvent. *Held*, that the bank at K. was negligent in not transmitting the check direct to its correspondent at S., and the suspected insolvency afforded no excuse. (*Herider v. Phoenix Loan Association*, 82 Mo. App., 427.)
- 6 (Nebr., 1897). A bank which receives for collection the check of a customer must pay it upon the receipt thereof during business hours, or promptly give notice of its dishonor, in order to charge the drawers and indorsers. (*Western Wheeled Scraper Co. v. Sadilek*, 69 N. W. Rep., 765; 50 Nebr., 105.)
- 7 (N. Y.). Plaintiff bank forwarded to defendant bank for collection drafts drawn by W. on the K. bank, and defendant transmitted them to such bank, which, in payment, sent defendant drafts drawn by it on defendant. Defendant merely protested these, the account with it being overdrawn, and sent them to plaintiff. *Held*, that, though the K. bank was insolvent, defendant, having made no effort to obtain possession of the drafts sent it for collection, and not having had them protested and notice of protest given, was liable for the amount thereof. (*National Revere Bank v. National Bank of the Republic*, 66 N. Y. S., 662; 54 App. Div., 342.)

## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## DUTY OF BANK TO TAKE PROPER STEPS TO CHARGE INDORSER AND LIABILITY FOR FAILURE TO TAKE PROPER ACTION—continued.

- 8 (N. Y.). Where a notary public in the employ of a bank protested notes deposited for collection, without allowing days of grace, by reason of which improper protest the indorsers were relieved from liability, the bank was liable to the owner of the notes for whatever damages he sustained thereby. (*Hitchcock v. Bank of Suspension Bridge*, 68 N. Y. S., 234; 57 App. Div., 458.)
- 9 (S. Dak.). A note payable on Sunday was left at defendant's bank before maturity for collection, with instructions to protest the same in case it was not paid. The note was protested on Thursday following its maturity, which, in an action on the note, was held to be too late to hold the indorser. *Held*, that the bank was bound to use a reasonable degree of skill only, and the question of law involved being one of serious doubt and difficulty owing to the condition of the statutes relating to holidays and days of grace, the bank was not liable to the holder of a note for the damages sustained by reason of the release of the indorser. (*Morris v. Union Nat. Bank*, 83 N. W. Rep., 252; 50 L. R. A., 182; 13 S. D., 329.)
- 10 (Wis., 1896). Plaintiff, as indorsee of notes due August 4, sent them to defendant bank for collection. Before they were received by defendant the bank building was burned, but on August 1 the bank resumed business and notified the maker of the notes. *Held*, that the defendant, having undertaken the collection of the notes, was not excused from liability for its negligence in not protesting the notes by reason of the confusion consequent upon the fire. (*Merchants' State Bank v. State Bank of Phillips*, 69 N. W. Rep., 170; 94 Wis., 444.)

*Liability for failure to notify indorser.*

- 11 (Nebr., 1893). A bank receiving for collection, from a correspondent, checks drawn upon it by a customer with instructions to protest in case of nonpayment, is required in case payment is refused for want of funds to give notice to the bank from which they were received not later than the next day after dishonor; and when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury will be warranted in finding that the bank intended to accept them and become liable thereon. (*Wood River Bank v. First National Bank of Omaha*, 55 N. W., 239; 36 Nebr., 744.)

*Bank only liable for care in selecting notary.*

- 12 (Nebr.). The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. (*Wood River Bank v. First National Bank of Omaha*, 55 N. W., 239; 36 Nebr., 744.)
- 13 (Nebr.). But where such bill remains in the bank to be protested for nonpayment by the president and manager thereof, a notary public, who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank and the latter will be liable for his negligence. (Ib.)
- 14 (Iowa, 1899). A draft received by the defendant bank for collection having been presented to the drawee and payment refused was placed in the hands of a notary public, who was also defendant's cashier, with instructions to protest for nonpayment. It was not contended that defendant was negligent in selecting such notary. *Held*, that the bank was not chargeable with the notary's negligence in failing to promptly send notice of protest. (*First National Bank of Manning v. German Bank of Carroll County et al.*, 1 Banking Cases, 300; 107 Iowa, 543.)

## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## NEGLECTANCE IN ACCEPTING SOMETHING OTHER THAN CASH IN PAYMENT.

- 1 (Ark., 1900). Where the holder of a check delivers it to a bank, as his bailee, for collection, and the latter sends it by mail to the drawee, who lives at a distance, and the drawee, upon receipt of the check, having money on deposit to the credit of the drawer, indorses the check "paid" and delivers it to the drawer, as between the payee or holder and the drawer the check is paid, and if the bailee bank, instead of receiving the cash, takes, for the amount of the check, exchange which proves to be worthless, the loss which the holder thereby sustains is the result of his own negligence, or that of the bailee bank. (*O'Leary et al. v. Abeles et al.*, 2 Banking Cases, 773; 68 Ark., 259.)
- 2 (Iowa, 1898). A collecting bank can not accept, in payment of notes belonging to its principal, a claim for deposits made against it by the maker of the notes. (*Bank of Montreal v. Ingerson*, 75 N. W. Rep., 351; 105 Iowa, 349.)
- 3 (Md., 1894). Where the payee of a check makes a demand on the drawee and receives something other than cash in payment, he can not, by making a second demand, though within the time allowed for presenting a check, undo the first, and render the drawer liable on the bankruptcy of the drawee. (*Anderson v. Gill*, 29 A., 527; 79 Md., 312.)
- 4 (Mo., 1899). The H. bank sent a draft, of which it was the holder for value to the A. bank for collection, and the latter forwarded it to the plaintiff bank for collection and return. And plaintiff accepted the drawee's check on another bank in payment of the draft which it delivered to the drawee, and remitted the amount of the draft to the A. bank. The check proving to be worthless, plaintiff brought an action against the A. bank to recover the amount of the remittance. *Held*, that when plaintiff received the check and surrendered the draft, it made the check its own and its liability to the H. bank became fixed, as much so as if it had received the cash, and there could be no recovery. (*National Bank of Commerce of Kansas City v. American Exch. Bank of St. Louis*, 2 Banking Cases, 101; 151 Mo., 320.)
- 5 (Mo., 1899). The custom of banks in collecting drafts, to surrender them to the drawees by taking checks in payment therefor, is unreasonable. (*Ib.*)
6. If a bank takes anything other than money it takes the risk of the payment of it.  
(Ill.) *Bank of Antigo v. Union Trust Co.*, 149 Ill., 343; 36 N. E., 1029;  
(N. Y.) *Commercial Bank v. Union Bank*, 11 N. Y., 203;  
(Pa.) *Hazlett v. Comm. National Bank*, 132 Pa., 118.
- 7 (Ohio). Where a note is left with a bank for collection, such bank has no authority to accept anything except money as payment. (*Dunn v. Dewey*, 7 Ohio N. P., 334; 5 Ohio S. & C. P. Dec., 149.)
- 8 (Pa.). Where a bank, in collecting a check left with it for collection, accepted a check instead of money, and before the check was paid the bank giving it made an assignment, the first bank was liable to the depositor for the amount of the check, since it was its duty to collect in money. (*Farmers and Mechanics' National Bank v. Cuyler*, 18 Lanc. Law. Rev., 54; 9 Pa. Dist. R., 539.)
- 9 (Tenn., 1897). It is a reasonable usage for local banks to accept, in payment of drafts given them for collection, certified checks on one of their own number in good standing, to present these checks each day at 11 a. m., and to leave them for examination. (*Jefferson County Sav. Bank v. Commercial Nat. Bank*, 39 S. W. Rep., 338.)

## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## NEGLECTANCE IN ACCEPTING SOMETHING OTHER THAN CASH IN PAYMENT—continued.

10 (Tenn., 1897). A principal selecting a bank as his collecting agency is bound, in the absence of special directions, by any reasonable usage prevailing and established among the banks at the place where the collection is to be made, whether he knows of it or not. (Ib.)

*Bank can not accept partial payment.*

11 (Ala.). A collecting bank has no right to accept a partial payment. (Lowenstein v. Bressler, 109 Ala., 326.)

## LIABILITY BETWEEN BANKS.

["If there is an express contract governing the liability of the initial bank, that contract will govern. (Exchange Natl. Bank v. Third Natl. Bank, 112 U. S., 276; In re State Bank, 56 Minn., 119; Power v. First Natl. Bank, 6 Mont., 251.) But it would be against public policy for the bank to contract against liability for its own negligence, although it could contract against liability for its correspondent's negligence. (See Minneapolis Co. v. Metropolitan Bank, 44 L. R. A., 504.)"—Zane's Law of Banks and Banking, page 306.

In States where the courts hold that the first bank is responsible for the acts or default of its correspondent, the first bank has the right to bring an action for negligence against its correspondent; in States where the courts hold that the correspondent bank is the agent of the holder, the holder has the right to bring an action for negligence against the correspondent bank.]

*Where first bank is liable for correspondent bank.*

1. The first bank is liable for all defaults of the correspondent bank. (U. S. Sup. Ct., 1884) Exchange National Bank v. Third National Bank, 112 U. S., 276; (U. S. Sup. Ct.) Hoover v. Wise, 91 U. S., 308; (Ind.) Tyson v. State Bank, 6 Blackf., 225; (N. J.) Davey v. Jones, 42 N. J. Law, 28; (N. Y.) Castle v. Corn Exchange Bank, 148 N. Y., 122; (Ohio) Reeves v. State Bank, 8 Ohio St., 465.
- 2 (Ohio). Where a bank in the State receives for collection a draft payable at another bank within the State, but transmits the draft to a foreign bank in the course of collection, which in turn transmits it to the bank at which it is payable, the last-named bank is responsible for its negligence in collection only to the foreign bank. (First National Bank v. Mansfield Savings Bank, 10 Ohio Cir. Ct. R., 233.)
- 3 (Ohio). Where a bank receives a draft for collection, and transmits it in the course of business to another bank, the cashier of the latter bank has no implied authority to agree to defend in behalf of his bank an action against the first bank by the drawer of the draft for negligence in collection. (Ib.)
- 4 (Tex., 1897). Where a bank receives commercial paper for collection, it is liable for the defalcations of its agents employed in making the collection. (State Nat. Bank of Ft. Worth v. Thomas Mfg. Co., 42 S. W. Rep., 1016; 17 Tex. Civ. App., 214.)
- 5 (Tex., 1898). Where a note is deposited with one bank, to be collected at a point where it has no agent, and it forwards the same to another bank for collection, in the absence of any special agreement or custom of bankers which fixes another measure of liability, the bank to which the note is sent is the agent of the bank with which the deposit was made, and it is responsible to the depositor for the defaults of such agent. (Schumacher v. Trent, 44 S. W. Rep., 460; 18 Tex. Civ. App., 17.)



## COLLECTIONS—Continued.

## NEGLECTANCE IN MAKING COLLECTIONS—continued.

## LIABILITY BETWEEN BANKS—continued.

*Where first bank not liable for correspondent bank.*

6. The first bank is only liable for due care and diligence in selecting a correspondent bank which becomes the agent of the holder.  
 (Colo.) Bank *v.* Burns, 12 Colo., 539;  
 (Conn.) East Haddam Bank *v.* Scovil, 12 Conn., 303;  
 (Ill.) Waterloo Milling Co. *v.* Kuenster, 158 Ill., 259; 41 N. E., 906;  
 (Iowa) Guelick *v.* National State Bank, 56 Iowa, 434;  
 (Kans.) Bank *v.* Ober, 31 Kansas, 599;  
 (La.) Hum *v.* Union Bank, 4 Rob. La., 109;  
 (Md.) Citizens Bank *v.* Howell, 8 Md., 530;  
 (Mass.) Fabens *v.* Mercantile Bank, 23 Pick., 330;  
 (Miss.) Third National Bank of Louisville *v.* Vicksburg Bank, 61 Miss., 112;  
 (Mo.) Daly *v.* Butchers Bank, 56 Mo., 94;  
 (Nebr.) First National Bank *v.* Sprague, 34 Nebr., 318;  
 (Tenn.) Bank of Louisville *v.* Bank, 8 Baxt., 101;  
 (Wis.) Stacy *v.* Dane Co. Bank, 12 Wis., 629.

*When first bank not liable for correspondent's negligence.*

- 7 (Ill.). A bank which receives checks to be transmitted to another place for collection without compensation fully discharges its duty by sending them in due season to a solvent and competent correspondent, with proper instructions for their collection, and is not liable for any loss occasioned by the negligence of such correspondent. (Anderson *v.* Alton National Bank, 59 Ill. App., 587.)
- 8 (Ill.). Where a bank receives a check for transmission and collection, and it does not agree to be responsible at all events, it fully discharges its duty by sending the check to a competent and reliable agent with the proper instructions for the collection of same. Then the agent selected becomes the agent of the owner of the check and not of the bank transmitting it. (Carlinville Nat. Bank *v.* Wilson, Wilson *v.* Carlinville Natl. Bank, 78 Ill. App., 339.)
- 9 (Ind., 1898). A bank with which is deposited a foreign draft for collection, which the owner knew could be collected only by transmitting it to a subagent, is not liable for the default of the subagent, if due care has been used in his selection, although the bank was to receive a consideration for the services. (Irwin *v.* Reeves Pulley Co., 20 Ind. App., 101; 50 N. E. Rep., 317.)
- 10 (Ky., 1901). A bank is not liable to its customer for negligence of its correspondent as to the collection of a note where there was no negligence in the selection of the correspondent. (Second Nat. Bank *v.* Merchants' Nat. Bank, 65 S. W. Rep., 4; 4 Banking Cases, 25.)
- 11 (Mo.). If a bank that has received a paper for collection on a person at a distant place transmits it to a competent and reliable agent, with proper instructions, its responsibility ceases. (American Exchange Nat. Bank *v.* Metropolitan Nat. Bank, 71 Mo. App., 451.)
- 12 (Tenn., 1898). Where a person deposits with a bank for collection checks on a distant bank, and in the usual and regular course of business the first bank transmits them for collection to a third, the latter becomes the agent of the depositor and the first bank is not liable for the third bank's negligence in the collection. (Givan *v.* Bank of Alexandria, 52 S. W. Rep., 923; 47 L. R. A., 270.)

## LIABILITY OF FIRST BANK FOR SENDING DIRECT TO DRAWEE.

- 1 (Ill., 1900). Although the depositor of a check drawn on a bank in a distant city may not be familiar with the details of the system in force among banks for the collection of such checks, if he knows that the collection of the check is to be made, without expense to him, through

## COLLECTIONS—Continued.

## NEGLECTENCE IN MAKING COLLECTIONS—continued.

## LIABILITY OF FIRST BANK FOR SENDING DIRECT TO DRAWEE—continued.

banks operating together, in compliance with certain usages and customs existing between such institutions to enable such collections to be made, and knows that the drawee bank is the only bank in such city, the collecting bank can not be held negligent in selecting a correspondent merely because it did so with knowledge that the latter would send the check for payment directly to the drawee bank. (*Wilson v. Carlinville Nat. Bank*, 3 Banking Cases, 1; 187 Ill., 222.)

- 2 (Minn., 1899). An established usage and custom existing among banks to send checks or drafts payable by other banks at distant points to the drawee directly and by mail, in case there is no other bank of good standing in the same town, will not excuse or justify such a course of procedure. In case of loss through the bad conduct of the drawee, the sender of the check or draft must bear it. (*Minneapolis Sash & Door Co. v. Metropolitan Bank*, 1 Banking Cases, 286; 76 Minn., 136.)
- 3 (Nebr., 1897). A bank which undertakes to collect the check of a customer is negligent if it sends it for payment direct to the drawee bank if there is in the same town another bank in good standing. (*Western Wheeled Scraper Co. v. Sadilek*, 69 N. W. Rep., 765; 50 Nebr., 105.)
- 4 (Oreg., 1899). It is not negligence for a bank receiving for collection an ordinary unindorsed check against an account with a bank situated and doing business at a place distant from where the collecting bank is located, and where the collecting bank has no agent or correspondents, to forward the check by mail directly to the drawee bank and returns where such method is sanctioned by a general and well-established custom among banks. (*Kershaw v. Ladd et al.*, 1 Banking Cases, 271; 34 Oreg., 375.)
- 5 (Tenn., 1898). A bank holding checks for collection is guilty of negligence in sending them directly to the drawee bank. (*Givan v. Bank of Alexandria*, 52 S. W. Rep., 923; 47 L. R. A., 270.)
- 6 (Tex., 1896). A bank which has a draft for collection will not be excused for negligence in sending it direct to the drawee, instead of through a third person, if it would have been collected had it been sent at the time it was sent to a third person, though had the bank delayed sending it as long as it might have without negligence it would not have reached its destination in time to be collected. (*First National Bank v. City National Bank*, Tex. Civ. App., 34 S. W., 458; 12 Tex. Civ. App., 318.)
- 7 (Tex.). A bank having a draft of \$2,000 for collection will not be held liable for negligence in sending it direct to the drawee bank, instead of through a third person, where, at 1 o'clock on the day on which it reached its destination, the drawee bank required \$1,000 to insure its ability to meet local checks which might be presented that day after the hour, and was furnished that amount by another bank for that purpose, to prevent a general run on local banks. (Ib.)

## LIABILITY FOR MAILING COLLECTION DIRECT TO DRAWER.

- 1 (U. S. C. C. A., 1893). A bank receiving a certificate of deposit for collection, and mailing it to the drawer with a request for a remittance, is guilty of negligence. (*First National Bank of Evansville v. Fourth National Bank of Louisville*, 56 Fed. Rep., 967.)
- 2 (U. S. C. C. A., 1893). The E. bank, on May 8, 1888, mailed to the L. bank for collection a certificate of deposit issued by P. & Co., which, the next day, negligently mailed it to P. & Co., with request to remit. On June 1 the L. bank credited the E. bank with the item in account current for May, and wrote that nothing had been heard from P. & Co. On June 22 the L. bank wrote that repeated letters about the

## COLLECTIONS—Continued.

## NEGLIGENCE IN MAKING COLLECTIONS—continued.

## LIABILITY FOR MAILING COLLECTION DIRECT TO DRAWER—continued.

item had remained unanswered. The L. bank now charged the E. bank with the item. No further correspondence ensued. P. & Co. continued in good credit until after January 1, 1889, when they failed. *Held*, that the L. bank was not responsible for more than nominal damages. (Ib.)

- 3 (Mich., 1900). Although it is negligence in a collecting bank, unless instructed to do so, to send the collection directly to the drawer, a bank in D. receiving for collection a certificate of deposit issued by the only bank in B., with instructions from the forwarding bank to secure the best rate of exchange, and stating that it knew that the D. bank had a correspondent in B., is not negligent in sending, in good faith, the certificate directly to the issuing bank, its only possible correspondent in B., as the lowest rate of exchange could be obtained in no other way, especially as the issuing bank's rating was known to be good. (*First Nat. Bank of Chicago v. Citizens' Savings Bank of Detroit*, 2 Banking Cases, 430; 123 Mich., 336.)
- 4 (Mich., 1900). In the absence of instructions to do so, it is negligence for a bank to which a certificate has been given for collection to send it direct to the drawer; and such negligence makes the sender liable for any loss resulting therefrom. (Ib.)

## LIABILITY OF FIRST BANK TO HOLDER FOR WRONGFUL OR NEGLIGENT ACT.

- 1 (Ala., 1897). Where a bank through negligence loses transfers of land certificates sent to it to collect the sum for which they were given as collateral security it is liable for the expenses of prosecuting suits to establish them, though such expenses would not have been necessary if the sender had recorded them before sending. (*First Nat. Bank of Birmingham v. First Nat. Bank of Newport*, 22 So. Rep., 976; 116 Ala., 520.)
- 2 (Ga., 1895). Where the owner of a check, which had been collected without her authority by a bank, accepted, with knowledge of the facts, part of the proceeds of the collection, and a note for the balance of her claim arising out of the transaction, she thereby ratified the collection, and the bank was, hence, not liable to her. (*Hughes v. Neal Loan & Banking Co.*, 23 S. E., 823; 97 Ga., 383.)
- 3 (Kans., 1895). Where a note was placed in a bank for collection, with instructions to collect when due and apply the proceeds to the depositor's paper, and a person voluntarily selected by the bank to present the note at the place named for payment and receive payment thereon collected the note, the bank was liable for the proceeds to the owner. (*First National Bank v. Craig* (Kans. App.), 42 P., 830.)

## SURRENDER OF COLLATERAL BEFORE MAKING COLLECTION.

*Bank must hold bill of lading until draft is paid or accepted.*

- 1 (U. S. Sup. Ct., 1875). A bill of lading of merchandise deliverable to order, when attached to and forwarded with a time draft, sent without special instructions to an agent for collection, may be surrendered to the drawee on his acceptance of the draft. It is not the agent's duty to hold the bill after such acceptance. (*National Bank of Commerce of Boston v. Merchants' National Bank of Memphis*, 91 U. S., 92.)
- 2 (Fla., 1898). In the absence of special instructions, if a time bill of exchange with a bill of lading attached be sent to an agent for collection, there is an implied obligation upon the agent to hold the bill of lading until the bill of exchange is either accepted or paid, according to circumstances, and he can not deliver the bill of lading without

## COLLECTIONS—Continued.

## SURRENDER OF COLLATERAL BEFORE MAKING COLLECTION—continued.

requiring the one or the other. (Oxford Lake Line *v.* First Nat. Bank of Pensacola, 1 Banking Cases, 126; 40 Fla., 349.)

- 3 (Ga.). Where a shipper consigned goods to his own order, at the same time drawing in favor of a bank, "for collection," a draft on the person to whom the goods were to be delivered on payment of the draft, and attached the draft to a bill of lading so indorsed as to give the bank control of the possession of the goods, a delivery of the goods by the bank to the drawee of the draft, without securing its payment was, as against the owner, a conversion. (Hobbs *v.* Chicago Packing and Provision Co., 25 S. E. Rep., 584; 98 Ga., 576.)

*Examination of "Papers to be delivered upon payment of draft."*

- 4 (Mass.). The written instruction, "Papers to be delivered only upon payment of draft," sent to a collector with a draft and a sealed package of papers, is not violated by the collector in allowing the drawee to open the package and inspect the papers before paying the draft, as such a temporary surrender for inspection is not a "delivery." (People's Nat. Bank *v.* Freeman's Nat. Bank, 47 N. E. Rep., 588; 169 Mass., 129.)

## MISCELLANEOUS.

*When correspondent bank not liable for illegal collection.*

- 1 (U. S. Dist. Ct., 1895). A bank which, as collecting agent of another bank, collects at the subtreasury a pension draft on which the payee's name has been forged after her death, indorsing the draft as collecting agent, and remits the proceeds, without knowledge of the forgery, is not liable to the United States for the amount so collected. (Onondaga Co. Sav. Bank *v.* United States (C. C. A.), 64 F., 703, distinguished; United States *v.* American Exchange National Bank, 70 Fed. Rep., 232.)

*Collecting bank need not remit same money collected.*

- 2 (U. S. C. C. A., 1896). When a bank indorses commercial paper "for collection" and forwards the same to another bank for collection and remittance, the collecting bank, though it acts only as agent for the remitting bank, and has no mutual account with it, is not required to keep the moneys collected separate from all other moneys in its possession, and to remit the identical money, nor is the payer of such paper required to see that the identical money is remitted. (First National Bank of Richmond *v.* Wilmington and Weldon Railroad Co., 77 Fed. Rep., 401.)

*When notice given, no payment to be made.*

- 3 (Cal., 1902). On an issue whether plaintiff bank, in paying a draft drawn by a third party on defendant, had done so at defendant's request, or had merely received it for collection, it was error not to allow the defendant to show that prior to the payment of the drafts he had notified plaintiff's correspondent that he would not pay any more drafts drawn on him by this party unless such party had sufficient credits to cover the amount thereof, whether such correspondent was plaintiff's general agent or only an agent for the purpose of collecting drafts. (First Nat. Bank of Riverside *v.* Jacoby, 69 Pac. Rep., 690; 4 Banking Cases, 695; 137 Cal., 17.)

*When holder liable to first bank.*

- 4 (Conn.). An indorsee of a bill indorsed and delivered it to plaintiff bank for collection, and the bank forwarded it to its correspondent where it was payable for collection, without indorsing it. Not being paid when due, it was protested, and due notice given to the drawer, but no notice was given to the bank or to the indorser; and the bank, two weeks afterwards, supposing the bill to have been paid, paid it to defendant, and on discovering its mistake sued him to recover the

## COLLECTIONS—Continued.

## MISCELLANEOUS—continued.

money. *Held*, that the bank was justified in assuming that the draft had been paid, and having paid the money under mistake of fact, might recover it. (*East Haddam Bank v. Scovil*, 12 Conn., 303.)

- 5 (Tenn., 1898). Where checks are intrusted with a bank for collection, and it credits them to the depositor's account as cash, and the deposit slip and the pass books contain a statement that "all cash items not actual cash are entered subject to payment," the depositor can not recover the amount of the checks when the bank, using due care, fails to collect them. (*Givan v. Bank of Alexandria*, 52 S. W. Rep., 923.)

*Payment to one not agent of holder.*

- 6 (Pa.). The owners of a draft on a bank indorsed it to the K. bank for collection, and it was sent by the latter bank to the clearing house, in due course, with other checks and drafts. The K. bank was closed before the balance against it on the clearing-house settlement was adjusted, and thereupon the clearing house called upon the drawee, also one of its members, to pay to it the amount of the draft. *Held*, that the payment being to a stranger to the draft, who had no interest in the proceeds nor authority to act as agent for the owners, it was no defense to an action by the owners against the drawee for the amount of the draft. (*Crane v. Fourth St. National Bank*, Pa. Sup., 34 A., 296; 173 Pa. St., 566.)

*Remittance—Custom—Instructions.*

- 7 (U. S. C. C. A., 1905). The instruction of a bank, in sending to one bank for collection a check on another bank, "Remit New York exchange," authorizes the remittance only in accordance with custom, be that the sending of a draft drawn on a New York bank by the bank to which the check was sent or a draft drawn by another. (*Holder v. Western German Bank*, 136 Fed. Rep., 90.)

*Trust relation.*

- 8 (U. S. C. C. A., 1905). Plaintiff deposited a check with defendant bank for collection, as plaintiff's agent. Defendant forwarded it to the F. bank for collection, with the instruction, "Remit New York exchange." The F. bank remitted the proceeds of the collection by its own draft on a New York bank, which the New York bank, at direction of the receiver of the F. bank, who in the meantime had been appointed, refused to pay. *Held*, that the F. bank was liable, as trustee for the money collected, there being no authorization by defendant that its relation should be changed to that of debtor, so that defendant was not liable. (*Ib.*)

*Draft attached to bill of lading—Indorsement—Bank holding for collection.*

- 9 (Texas Civ. Appeals, 1902). Where a draft attached to a bill of lading was indorsed "Pay to the order of American National Bank" and by the latter indorsed "Pay any bank or banker or order American National Bank," and was presented by defendant bank to the drawee, such indorsements were sufficient to put the drawee on inquiry that defendant was a holder for collection only, and was not a purchaser of the draft payable to bearer. (*Gregory et al. v. Sturgis Natl. Bank*, 5 B. C., 153; 71 S. W. Rep., 66.)

*Breach of drawer's contract—Liability of bank.*

- 10 (Texas Civ. Appls., 1902). A bank holding a draft attached to a bill of lading, for the price of corn shipped, which holds the draft for collection only, and not as a purchaser, is not liable to the drawee after receiving payment for a deficiency in quantity of the corn purported to be shipped, and for the drawer's failure to pay the freight as agreed and as shown by the invoice attached to the draft and bill of lading. (*Ib.*)

## COMPTROLLER OF CURRENCY.

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## CONSTITUTIONALITY.

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1 (U. S. Sup. Ct.). Congress has the power to incorporate a bank.

The Government of the Union is a government of the people; it emanates from them; its powers are granted by them, and are to be exercised directly on them and for their benefit.

The Government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land.

There is nothing in the Constitution of the United States, similar to the Articles of Confederation, which includes incidental or implied powers.

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union it may be exercised by that Government.

If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The act of the 10th April, 1816, c. 44, to "incorporate the subscribers to the bank of the United States," is a law made in pursuance of the Constitution.

The Bank of the United States has, constitutionally, a right to

## CONSTITUTIONALITY—Continued.

- establish its branches or offices of discount and deposit within any State.
- (U. S. Sup. Ct., 1819.) *McCulloch v. State of Maryland*, 4 Wheat. (17 U. S.), 315;
- (U. S. Sup. Ct., 1824.) *Osborne et al., appellants, v. Bank of the United States*, 9 Wheat. (22 U. S.), 737.
- 2 (U. S. Sup. Ct., 1869). Congress having, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, may secure the benefit of it to the people by appropriate legislation. (*Veazie Bank v. Fenno*, 8 Wall., 533; 1 N. B. C., 22.)
  - 3 (U. S. Sup. Ct., 1869). The tax of 10 per cent imposed by the act of July 13, 1866 (14 Stat. L., 146, sec. 9), on the circulation of State banks used for currency and paid out by the national or State banks is not repugnant to the Constitution, either on the ground that the tax is a direct tax, which must be apportioned among the several States, or that the act impairs franchises granted by the State. (Ib.)
  - 4 (U. S. Sup. Ct., 1879). The provisions of section 3413 of the national-bank act that "every national banking association, State bank or banker, or association, shall pay a tax of 10 per cent on the amount of notes of any town, city, or municipal corporation paid out by them" is constitutional, even where its effect is to tax an instrumentality of a State. (*Merchants' National Bank of Little Rock v. United States*, 101 U. S., 1; 2 N. B. C., 100.)
  - 5 (U. S. Sup. Ct., 1875). National banking associations, being instruments designed to aid the Government in the administration of a branch of the public service, can not be controlled by the States, except in so far as Congress may see proper to permit. (*Farmers and Mechanics' Bank v. Dearing*, 91 U. S., 29.)
  - 6 (U. S. Sup. Ct., 1865). Act of 1864 "to provide a national currency," etc., subjects shares of banks authorized by it to taxation by States, though part or whole of capital is invested in national securities exempt from State taxation, and is constitutional. (*Van Allen v. Assessors*, 3 Wall., 573.)
  - 7 (U. S. C. C., 1885). Congress has the power to divest the United States courts of their jurisdiction of suits by or against national banking associations. (*National Bank of Jefferson v. Fare et al.*, 25 Fed. Rep., 209.)
  - 8 (Ala.). National banking corporations, organized under the acts of Congress providing for their creation, are agencies or instruments of the General Government, designed to aid in the administration of an important branch of the public service, and are an appropriate constitutional means to that end. (*Pollard v. The State, ex rel. Zuber*, 65 Ala., 628.)
  - 9 (Me.). A State law prohibiting the establishment of banking companies in the State without the authority of the legislature was not intended to apply to banking corporations created by authority of Congress, since such corporations may be legally established in the State without the consent of the legislature. (*Stetson v. City of Bangor*, 56 Me., 274.)
  - 10 (Md.). Congress has power to clothe national banking associations, as to their contracts and dealings with the world, with any special immunities and privileges exempting them, in their trade and intercourse with others, from the laws and remedies applicable in like cases to other citizens. (*The Chesapeake Bank v. The First National Bank of Baltimore*, 40 Md., 269.)
  - 11 (Md.). Thus the provision of the banking law that no attachment, injunction, or execution shall issue against a national banking association before final judgment in any suit, action, or proceeding in a State court is constitutional. (Ib.)
  - 12 (N. C.). The State, until forbidden by Congress, has the power to tax national-bank bills. (*Lilly v. The Board of Commissioners of Cumberland County*, 69 N. C., 300.)

## CONSTRUCTION OF LAW.

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*When State court decisions given weight.*

- 1 (U. S. C. C. A., 1892). The Federal courts, when called upon to construe the general commercial law of Indiana in respect to a question which is a new one in the Federal courts, should give weight to the Indiana decisions, although they are not absolutely bound thereby. (*Burgess v. Seligman*, 107 U. S., 20, followed; *The Farmers' National Bank of Valparaiso, Ind., v. Sutton Manufacturing Company*, 52 Fed. Rep., 191.)
- 2 (U. S. C. C., 1879). Where the State and Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court; and in such cases the Federal courts will follow the decisions of the local State tribunals and will administer the same justice which the State courts would administer between the same parties. (*Price, Receiver of Venango National Bank, v. Yates*, 19 Alb. L. J., 295; 2 N. B. C., 204.)
- 3 (U. S. C. C., 1883). It is the peculiar province of the supreme court of the State to determine the meaning of the statutes of such state, and with such determination courts of the United States will hesitate to place upon a State statute any construction which will bring such statute in conflict with a statute of the United States, and therefore render it void. (*Davenport National Bank v. Mittlebuscher, Collector, et al.*, 15 Fed. Rep., 225.)
- 4 (U. S. C. C., 1901). Where the validity of a statute under a State constitution has been determined by the highest court of the State, its decision will be followed by the Federal courts. (*People's National Bank of Lynchburg v. Marye, Auditor of Public Accounts*; *First National Bank of Lynchburg v. Same*; *Lynchburg National Bank v. Same*; *National Exchange Bank of Lynchburg v. Same*, 107 Fed. Rep., 570.)

*Construction of State statutes.*

- 5 (U. S. Sup. Ct., 1879). The intention of the legislature, clearly expressed in a constitutional enactment, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. Any construction should be disregarded which leads to absurd consequences. (*Oates v. First National Bank of Montgomery*, 100 U. S., 239; 2 N. B. C., 35.)
- 6 (U. S. Sup. Ct., 1879). The Federal courts are not bound by decisions of State courts upon questions of general commercial law. (*Ib.*)

*When valid portions of a statute upheld.*

- 7 (U. S. Sup. Ct., 1881). In a statute which contains invalid or unconstitutional provisions, that which is unaffected by those provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded. (*Supervisors of Albany v. Stanley*, 105 U. S., 305.)

*Repeals by implication.*

- 8 (U. S. Sup. Ct., 1882). A law embracing an entire subject, dealing with it in all its phases, may withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the



## CONSTRUCTION OF LAW—Continued.

intention of the legislature. (*Cook Co. National Bank v. United States*, 107 U. S., 445.)

*When punctuation disregarded.*

- 9 (U. S. C. C., 1881). The punctuation of a statute is not made to be relied on, and must be disregarded if it requires a construction which is repugnant to a sense of justice. (*United States v. Voorhees*, 9 Fed. Rep., 143.)

*When Federal statute controls.*

- 10 (U. S. Dist. Ct., 1890). Where Congress has enacted a law covering a particular case, such law must prevail in the Federal courts though it differs from the State law. (*Stephens v. Bernays*, 42 Fed. Rep., 488.)

*When State statutes control.*

- 11 (U. S. C. C., 1887). Among the assets of an insolvent national bank were three mortgages which were sought to be impeached by the assignees of the mortgagor as having been given in violation of the insolvency law of the State. Plaintiff, receiver of the bank, claimed that the State law was inoperative upon the assets of a national bank and was ineffectual to divest him of the title acquired by the mortgages. *Held*, that the mortgages were governed by the State law, and the bank took them with all the limitations imposed by the laws of the State upon them. (*Witters, Receiver, etc., v. Sowles et al., Assignees*, 32 Fed. Rep., 758.)

*Section 5134, Revised Statutes United States, construed.*

- 12 (Ill.). By the provisions of Revised Statutes United States, section 5134, subdivision 2, requiring an association formed for the purpose of conducting a national bank to designate in its organization certificate "the place where its operations of discount and deposits are to be carried on," the town or city is meant, and not the office or building. (61 Ill. App., 33, affirmed; *McCormick v. Market National Bank*, 111. Sup., 44 N. E., 381.)

*As to power of national banks Federal decisions control.*

- 13 (Wash.). As the Supreme Court of the United States has decided that it has authority to reexamine the judgment of a State court as to the power of national banks under the act of Congress, a State court should follow its decisions on the question. (*First National Bank of Aberdeen v. Andrews et al.*; *Young v. Same*, 34 P., 913; 7 Wash., 261.)

*When Federal courts do not follow State courts.*

- 14 (U. S. Sup. Ct., 1880). The courts of the United States, in determining questions of general commercial law, are not controlled by the decisions of a State court, even in an action instituted by a national bank, located in the State rendering such decision, against one of its own citizens upon a negotiable note there executed and payable. Such decisions not based upon local legislative enactments are not "laws" within the meaning of the Federal statute, which provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." (*Brooklyn City and Newtown R. R. Co. v. National Bank of the Republic*, 102 U. S., 14.)

*Effect of decision of court having jurisdiction.*

- 15 (U. S. Sup. Ct., 1901). Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified and unreversed. (*Mitchell v. First National Bank of Chicago*, 180 U. S., 471.)

CONVERSION OF STATE BANKS. (*See ORGANIZATION.*)CORPORATE EXISTENCE. (*See ORGANIZATION.*)CREDITOR'S BILL AGAINST SHAREHOLDERS. (*See SHAREHOLDERS.*)

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GENERAL DEPOSITS.

GENERAL DEPOSITS, THE RELATION THAT OF DEBTOR AND CREDITOR.

1. The relation of banker and depositor is that of debtor and creditor.  
 (U. S.) *In re Madison Bank*, Fed. Cases, No. 890 (5 Biss., 515) ;  
 (La.) *Matthews v. Creditors*, 10 La. Ann., 344 ;  
 (Mass.) *National Bank v. Eliot Bank*, 5 Am. Law Reg., 711 ;  
 (Mo.) *Knecht v. U. S. Savings Inst.*, 2 Mo. App., 563 ;  
 (N. Y.) *Ætna National Bank v. Fourth National Bank*, 46 N. Y., 82 ;  
 (Tex.) *Baker v. Kennedy*, 53 Tex., 200.
- 2 (Fla. Sup., 1902). A bank becomes the absolute owner of money deposited with it to the general credit of a depositor; in the absence of any special agreement importing a different character into the transaction, and the relationship between the parties is simply that of debtor and creditor. (*Camp et al. v. First Natl. Bank of Ocala*, 33 So. Rep., 241 ; 5 B. C., 202.)
- 3 (Mo. Appls., 1903). A deposit of money in a bank does not create a bailment, but creates the relation of debtor and creditor. (*Arnold v. Sedalia Natl. Bank*, 5 B. C., 712 ; 74 S. W. Rep., 1038.)
- 4 (N. Y.). Deposits on general account belong to the bank and are part of its general fund. The bank becomes a debtor to the depositor to the amount thereof and the debt can only be discharged by payment to the depositor or pursuant to his order. (*Ætna National Bank v. Fourth National Bank*, 46 N. Y., 82.)
5. The contract has none of the elements of a trust. For a breach on the part of the bank of the obligation resulting from the relation between the parties the depositor alone can sue.  
 (N. Y.) *Ætna National Bank v. Fourth National Bank*, 46 N. Y., 82 ;  
 (Ohio) *Bank of Marysville v. Windisch Mulhauser Brewing Co.*, 50 Ohio State, 151 ;  
 (Pa.) *Bank of Northern Liberties v. Jones*, 42 Pa. St., 533 ;  
 (S. C.) *Dabney v. State Bank*, 3 S. C., 124 ;  
 (Va.) *Robinson v. Gardner*, 18 Grat., 509.
- 6 (U. S. C. C., 1883). Unlike checks, cash deposited by customers with the bank ceases to be the property of the depositor, and becomes the property of the bank, creating at once the relationship of debtor and creditor. (*Balbach et al. v. Frelinghuysen, Receiver, etc.*, 15 Fed. Rep., 675.)
- 7 (Fla.). General deposits in a commercial bank on account of the depositor, without being complicated by any other transaction than that of the depositing and withdrawing of the moneys, transfers the ownership of the money to the bank; and the relationship with reference thereto, as between the bank and the depositor, is simply that of debtor and creditor. (*Collins v. State*, 15 So., 214 ; 33 Fla., 429.)

## DEPOSITS—Continued.

## GENERAL DEPOSITS, THE RELATION THAT OF DEBTOR AND CREDITOR—continued.

- 8 (Okla., 1900). Deposits of money in a bank are either general or special. A general deposit is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor. (Bank of Blackwell v. Dean, 2 Banking Cases, 232; 9 Okla., 626.)
- 9 (Okla., 1900). Deposits of money made in a bank in the ordinary course of business are presumed to be general, and the burden of proof is on the depositor to overcome such presumption by showing that the deposit was made under such stipulations or directions as to constitute it a special deposit. (Ib.)
- 10 (Okla., 1900). Unless there are stipulations to the contrary, deposits of money made in a bank become a part of its general funds, and create the relation of debtor and creditor between the depositor and the bank. (Ib.)
- 11 (Wash., 1895). A person deposited money with a bank, taking from it a deposit slip in the form used for general deposits. Upon such slips were the words, "Security for signing bond to be held by bank." Subsequently the depositor, in order to change the security so the \$700 would be available for one purpose and \$800 for another, drew an ordinary check, which was marked "Paid," and a certificate of deposit for \$800 made out, to be held by the surety, and \$700 to secure other bondsmen. The first-named certificate was afterwards paid by the bank. The depositor testified that the deposit was a special one. *Held*, a general deposit and not a trust fund in the hands of a receiver. (Dearborn v. Washington Sav. Bank, Wash., 42 P., 1107; Watson v. Sheafe, ib.; 13 Wash., 345.)

## RECEIPT OF DEPOSITS.

## IN GENERAL.

*Bank may select its own customers.*

- 1 (N. Y.). A bank is not bound to receive on deposit the funds of every man who offers them, but may select its own customers. (Thatcher v. State Bank, 7 N. Y. Super. Ct., 121.)
- 2 (N. Y.). Where money is left with a paying teller for the purpose of paying a bill of one not a regular depositor the bank is not bound to make the payment unless it consented to receive the deposit. (Ib.)

*Deposit may be made payable to third party.*

- 3 (N. Y.). The fact that a deposit in a bank is so made that it may become payable to a third person for whose security the deposit is made does not deprive it of the character of a deposit. (Bushnell v. Chautauqua County National Bank, 74 N. Y., 290; affirmed, 10 Hun., 378.)

*Bank liable for acts of its officers.*

- 4 (Ill.). Where the cashier issued a certificate of deposit, placing on it a memorandum that the amount was to be paid to a creditor of the depositor, or, if he would not receive it, to be loaned for the depositor, the bank was liable, the cashier having acted within the scope of his duties. (First National Bank of Monmouth v. Brooks, 22 Ill. App., 238.)
- 5 (Mass.). Where bank officers are in the habit of receiving valuables to be placed in the vault for safe-keeping the officers will be considered to be acting for the bank. (Foster v. Essex Bank, 17 Mass., 479.)
- 6 (Mo.). Where a customer of a bank gave the teller a draft for collection and directed him to deposit the proceeds to his (the depositor) credit, or to the teller's credit as trustee, and the teller converted the money to his own use, it was held that when the bank received the draft through its teller for collection the teller acted for the bank. (Ihl v. St. Joseph Bank, 26 Mo. App., 129.)

## DEPOSITS—Continued.

## RECEIPT OF DEPOSITS—continued.

## IN GENERAL—continued.

- 7 (N. Y.). Where a depositor delivers money to an officer of a bank, who also did a private banking business, supposing he was dealing with the bank, and the officer used the money and failed, the depositor afterwards treating the officer as his debtor, he lost all right to hold the bank. (*Rich v. Niagara Co. Sav. Bank*, 5 Thomp. & C., 589.)
- 8 (Tenn.). Nonobservance by the officers of a bank of its rules and customs will not absolve it from liability for the tellers crediting the wrong person with a deposit received without ticket or pass book. (*Jackson Insurance Co. v. Cross*, 56 Tenn., 283.)

*Date of deposit.*

- 9 (Ind.). If money is deposited, the deposit will date from the receipt of the money at the bank and its entry on the depositor's pass book, and not from the date it was entered on the books of the bank. (*Wasson v. Lamb*, 120 Ind., 514.)

*Deposits by gambler, when bank party to conspiracy.*

- 10\* (U. S. C. C., 1904). A banking corporation may become a party to a fraudulent conspiracy, the same as a natural person, with like responsibility. It and its managing officers may legitimately receive on deposit the moneys of a gambler, with reason to believe it was won in gaming or by other questionable means; but they cross the line of permissibility when, with a knowledge that such depositor is obtaining the money by fraud or theft, they do acts in aid of the wrongful means by which the money is obtained. (*Wright v. Stuart et al.*, 130 Fed. Rep., 905.)

## WHO CAN RECEIVE DEPOSITS.

*Tellers.*

- 1 (N. Y.) The receiving teller is the proper officer to receive a deposit, and if a deposit is made with the paying teller, who assumes payment of the depositor's bill, the paying teller becomes the depositor's agent. (*Thatcher v. State Bank*, 7 N. Y. Super. Ct., 121.)
- 2 (N. Y.) Where the paying teller of a bank notified the customer that his account was overdrawn and the customer paid the difference to the paying teller, the bank was bound by the payment to the paying teller. (*East River National Bank v. Gove*, 57 N. Y., 597.)

*Cashier.*

- 3 (Ill.). The cashier of a State bank is authorized to receive deposits and his receipt is evidence of the deposit. (*State Bank v. Kain*, 1 Ill., 75.)

*President.*

- 4 (Wis.). The president of a bank has authority to receive deposits. (*Hazleton v. Union Bank*, 32 Wis., 34.)

## EFFECT OF ENTRIES IN PASS BOOKS.

- 1 (Kans.). An entry in a pass book is merely a receipt and is open to explanation. (*Talcott v. First National Bank*, 53 Kans., 480.)
- 2 (N. Y.). An entry in a pass book is prima facie evidence of the amount deposited. (*Asher v. National Park Bank*, 7 Alb. Law J., 43.)

## DEPOSIT OF CHECKS AND DRAFTS.

- 1 (U. S. Sup. Ct., 1905). The deposit of checks in a bank and the drawing against them by a customer constitutes the relation of debtor and creditor, and the bank becomes the absolute owner of the checks so deposited, and not the agent of the customer to collect them; this relation is not, in the absence of any special agreement, affected by the right of the bank against the customer, and his liability therefor,

## DEPOSITS—Continued.

## DEPOSIT OF CHECKS AND DRAFTS—continued.

in case the checks are not paid. (*Burton v. United States*, 196 U. S., 283.)

- 2 (U. S. C. C., 1883). Where checks are deposited to the credit of a depositor, the right to check against the balance thus created is a mere privilege, and the bank has a right to revoke the credit if the checks are not collected. (*Balbach v. Frelinghuysen*, 15 Fed. Rep., 675.)
- 3 (Ala.). If a bank purchases a draft, it does not become a deposit even though the cashier makes out a deposit slip to an illiterate man. (*Bank of Guntersville v. Webb*, 108 Ala., 132.)
- 4 (Pa.). Drafts and checks in favor of banks and held by them will be considered as received on deposit and not as deposited for collection unless there is some evidence to the contrary. (*Gettysburg National Bank v. Kuhns*, 62 Pa. St., 88.)

## OWNERSHIP OF DEPOSIT AND PAYMENT TO OTHER THAN THE OWNER.

- 1 (Ind.). A banker will be fully protected in paying the apparent owner of a deposit or one designated by him until he has notice that the ownership of the deposit is claimed by some one adversely to either of these parties. (*McEwen v. Davis*, 39 Ind., 109.)
- 2 (Pa.). The true ownership of a deposit may be proved to be in another than the person in whose name such deposit was made. (*Stair v. York National Bank*, 55 Pa. St., 364.)
- 3 (Pa.). When a bank has received money from a depositor and credited it to him on their books it can not allege that the money belonged to some one else. (*Citizens' Bank v. Alexander*, 120 Pa. State, 476.)

*Rival claimants—Duty of bank to protect itself.*

- 4 (Mo. Appls., 1903). Where a bank with which money has been deposited is sued by one other than the depositor for the funds, it should take some appropriate means to protect itself, such as depositing the money in court and asking a decision as to the ownership. (*Arnold v. Sedalia Natl. Bank*, 5 B. C., 712; 74 S. W. Rep., 1038.)

*Husband depositing wife's money—Ownership of deposit.*

- 5 (U. S. C. C., 1903). A husband deposited money belonging to his wife in a bank, taking out a pass book in her name, and drew it out on checks to which he signed her name. The wife had not authorized the deposit nor did she authorize the drawing of the checks. *Held*, that having accepted the deposit the relation of creditor and debtor was established between the wife and the bank, and that the bank could not discharge its indebtedness by paying out the money without her authority. (*Brown v. Daugherty et al.*, 5 B. C., 449; 120 Fed. Rep., 526.)

## DEPOSIT OF TRUST FUNDS.

- 1 (U. S. Sup. Ct., 1881). Although the relation between a bank and its depositor is that merely of debtor and creditor, the money which he deposits, if held by him in a fiduciary capacity, does not change its character by being placed to his credit in his bank account. (*National Bank v. Insurance Co.*, 104 U. S., 54.)
- 2 (U. S. Sup. Ct., 1881). When a bank account was opened in the name of a depositor as general agent, and it was known to the bank that he was the agent of an insurance company, that conducting its agency was his chief business, the bank is chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use. (*National Bank v. Insurance Co.*, 104 U. S., 54.)
- 3 (Cal., 1887). A bank has no right to assume that a customer depositing money as agent represents a fictitious principal or that he has power

## DEPOSITS—Continued.

## DEPOSIT OF TRUST FUNDS—continued.

to do anything more than deposit the money. (*Honig v. Pacific Bank*, 73 Cal., 464.)

- 4 (Mass., 1869). Where money is so deposited by a trustee that the bank has no notice of the trust, the bank is not liable for paying it out as if it belonged to the depositor. (*School District v. First National Bank*, 102 Mass., 174.)

*When deposit by an executor is a general deposit and not a trust deposit.*

- 5 (Iowa Sup., 1903). Where an executor deposited funds belonging to the estate with a bank, and drew checks against the funds, which were honored, there being no agreement to return the identical money deposited, or that the funds should be used for any specified purpose, the deposit was merely a general one. (*Officer v. Officer et al.* (Stewart, intervener), 5 B. C., 749; 94 N. W. Rep., 947.)

## DEPOSIT OF PARTNERSHIP FUNDS.

- 1 (U. S. C. C., 1826). A bank can not pay out partnership deposits on the private check of one partner. (*Coote v. United States Bank*, 3 Cranch C. C., 50; *Billings v. Meigs*, 53 Barb., 272.)
- 2 (U. S. C. C., 1826). If the bank can show that the funds were used for partnership purposes, it will not be liable, although the check on which it was drawn was the individual check of one of the partners. (*Coote v. United States Bank*, 3 Cranch C. C., 50.)

## EVIDENCE OF DEPOSIT—INSTRUCTIONS.

- 1 (Ala.). In an action by a bank to recover money advanced on a draft, for goods sold, deposited with it by the vendor, where it claims that the deposit was made for collection, and the depositor that it was a sale, it is proper to instruct that if it was a sale the bank could not recover, though there is evidence that the vendee, after the deposit, paid part of the price for which the draft was drawn directly to the vendor. (*Bank of Guntersville v. Webb*, 19 So., 14; 108 Ala., 132.)
- 2 (Ala.). An instruction that if an illiterate depositor, to whom a bank cashier fraudulently gave a deposit slip showing a deposit of a draft for collection instead of as a discount, "within a reasonable time, and on his first opportunity," repudiates the transaction as shown by the slip, would make no difference, is not objectionable as leaving to the jury the question of reasonable time. (Ib.)
- 3 (Ala.). Where a bank cashier, in receiving from an illiterate person a draft sold to the bank, fraudulently makes out his deposit slip for him so as to show a deposit for collection, and the depositor subsequently, on discovering the fraud, repudiates the transaction as a deposit for collection, and, on an issue as to whether the transaction was a purchase or a deposit for collection, the bank admits that the slip was a receipt for the draft, and the depositor claims that it was one for the proceeds, it is proper to refuse to instruct for the bank that the retention of the slip by the depositor after repudiation, and using it as evidence of its demand against the bank, rendered it binding on him. (Ib.)
- 4 (Ala.). Where a bank cashier, in receiving from an illiterate person a draft sold to the bank, fraudulently makes out his deposit slip for him so as to show a deposit for collection, it is error to admit evidence that the bank required the cashier to pay the draft on failure to collect it, on the issue as to whether the bank was liable as purchaser or as receiver for collection only. (Ib.)
- 5 (Ala.). On an issue as to whether the delivery of a draft to a bank was a purchase or a deposit for collection, the depositor may testify to his illiteracy to explain his accepting the deposit slip; and, having

## DEPOSITS—Continued.

## EVIDENCE OF DEPOSIT—INSTRUCTIONS—continued.

on cross-examination given the name of the person who first informed him of its contents, he may testify when and where the information was given. (Ib.)

- 6 (Cal., 1900). A pass book shown to be in the handwriting of the bank cashier, and to have been issued by him in the usual course of business, is admissible in evidence in an action by the depositor's administratrix against the bank to recover sums alleged to have been deposited. (*Nicholson v. Randall Banking Co.*, 62 Pac. Rep., 930; 3 Banking Cases, 26; 130 Cal., 533.)
- 7 (La., 1901). The book entries of deposits, made by a bank cashier who is dead (his handwriting and death being proven), accompanied by evidence corroborative of the contention of plaintiff that these entries exhibited all the deposits made by defendant, who kept no pass book, make a prima facie showing of the state and extent of defendant's deposit account, and suffice to shift the burden of proof on defendant to show other deposits. (*Bastrop State Bank v. Levy*, 31 So. Rep., 164; 4 Banking Cases, 409; 106 La., 586.)
- 8 (Mass., 1894). Testimony that the cashier of a bank failed to enter deposits on its books is not admissible as against the depositor to show that the deposits were made with the cashier in his individual capacity. (*L'Herbette v. Pittsfield National Bank*, 38 N. E., 368; 162 Mass., 137.)
- 9 (Mass.). An envelope on which the sums paid into and drawn out of a bank by a depositor are entered by the cashier is admissible against the bank to show the state of his account. (Ib.)
- 10 (N. Dak., 1900). The issuance of a deposit slip by a bank or the entry of a deposit in a pass book has only the effect of a receipt for money. While it raises a presumption that the deposit was made, yet it is open to parol explanation. (*Andrews et al. v. State Bank of Wheatland*, 2 Banking Cases, 508.)

## When relation not created.

- 11 (Pa.). Where one mails to a bank money and checks for deposit, but the bank refuses to acknowledge receipt thereof, and persistently denies such receipt, the relation of depositor and depositee is not created. (*Miller v. Western National Bank*, 172 Pa. St., 197; 33 A., 684.)

## INTEREST ON DEPOSITS.

- 1 (U. S. Sup. Ct., 1876). A national bank, holding deposits, refused to pay the same on demand and thereafter a receiver was appointed. *Held*, that the depositor was entitled to interest thereon from the date of the demand. (*National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S., 437; 1 N. B. C., 133.)
- 2 (U. S. Sup. Ct., 1876). The entire principal of the deposits, but no interest thereon, was paid by the receiver. *Held*, that interest upon the aggregate of unpaid interest was recoverable. (Ib.)
- 3 (U. S., 1875). Where a bank has, by reason of its own default, been placed in the hands of a receiver, a demand of payment by a depositor is no longer a necessary condition precedent to a right of action for the deposit, and the deposit bears interest from the time of such default. (*Chemical National Bank v. Bailey*, 1 N. B. C., 260; 12 Blatchford, 480.)
- 4 (U. S. C. C. A., 1900). A deposit upon which interest must be paid can not be special or in trust, and in case of the failure of the bank must, for the purpose of payment, be on the same footing with general deposits or unsecured demands. (*McNulta v. West Chicago Park Com'rs*, 2 Banking Cases, 764; 99 Fed. Rep., 900.)
- 5 (Ky., 1884). In an action against a bank to recover deposits, the balance found due plaintiff should bear interest from the institution of the action. (*Bobb v. Savings Bank of Louisville et al.*, 64 S. W. Rep., 494; 3 Banking Cases, 760.)



## DEPOSITS—Continued.

## INTEREST ON DEPOSITS—continued.

- 6 (W. Va.). A bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check until payment be demanded, unless upon special contract. (*Parkersburg National Bank v. Als.*, 5 W. Va., 50.)

*Evidence of contract to pay interest on deposits.*

- 7 (N. Y.). The fact that there are several entries in the books of a bank and in the pass book of a depositor of allowance of interest on his account is not sufficient to prove a contract by the bank to pay interest while the deposit should remain, where it is proven that after the entries were made the officers of the bank, on several occasions, told the depositor that it was against their rules to pay interest, and that they would not pay it, and that he apparently acquiesced. (*McLoughlin v. National Mohawk Valley Bank*, 139 N. Y. St., 514; 34 N. E., 1095.)

*Bank not liable for interest on money held in it by attachment.*

- 8 (Me.). A stockholder in a bank is not entitled to interest from the bank, either on ordinary dividends declared or on money due him from a reduction of capital stock, for a period during which the bank was prevented from paying him the same by attachments of his stock in suits of other parties, though the money thus belonging to him was during such time mingled by the bank with its general assets, the bank being ready and willing to pay over the same but for the attachments. (*Mustard v. Union National Bank*, 29 A., 977; 86 Me., 177.)

*Where payment to a depositor is refused on demand and the demand is subsequently withdrawn no interest can be recovered.*

- 9 (Mo. Appls., 1903). Where money is deposited in a bank, and there is no contract to pay interest, and payment to the depositor is refused on demand, but subsequently the depositor withdraws the money deposited without interest, no interest can be afterwards recovered. (*Arnold v. Sedalia Natl. Bank*, 5 B. C., 712; 74 S. W. Rep., 1038.)

## APPLICATION OF DEPOSIT ON CLAIM.

- 1 (U. S. C. C. A., 1900). A bank has the right to charge to the account of a general depositor the amount of notes of such depositor held by it which are due, and such right is not affected by the fact that the depositor is the receiver of a railroad, and as such made the deposits, where he also executed the notes in the same capacity. (*Dufkee v. National Bank*, 102 Fed. Rep., 845; 3 Banking Cases, 75.)
2. Where a bank holds funds as a general deposit it may appropriate them to the payment of the depositor's debt to the bank.  
(Ark.) *Dawson v. Real Estate Bank*, 5 Ark., 283;  
(Del.) *McDowell v. Bank of Wilmington and Brandywine*, 1 Har., 369;  
(N. Y.) *Commercial Bank v. Hughes*, 17 Wend., 94.
- 3 (Cal., 1899). General deposits made in a bank where the depositor is drawing against the account from time to time by checks and drafts are to be deemed as payments on account of any existing overdraft of the depositor. (*Santa Rosa Nat. Bank v. Barnett et al.*, 2 Banking Cases, 749; 125 Cal., 407.)
- 4 (Fla. Sup., 1902). The right of a bank to apply a depositor's credit balance to the satisfaction of a debt due it by such depositor is in the nature of a set-off or application of payments, which will not be required by law so as to benefit a surety liable for such debt where there is no instruction from the depositor to so apply it, nor agreement between him and the bank that it shall be done, and where the debt has not been included in the account between the bank and the depositor by the course of dealing between them. (*Camp et al. v. First Natl. Bank of Ocala*, 33 So. Rep., 241; 5 B. C., 202.)

## DEPOSITS—Continued.

## APPLICATION OF DEPOSIT ON CLAIM—continued.

- 5 (Ky., 1902). A bank may apply a deposit to the payment of a debt which it holds against a firm of which the depositor is a member, or may, when sued for the deposit, plead the firm debt as a set-off. (*Owsley v. Bank of Cumberland*, 66 S. W. Rep., 33; 4 Banking Cases, 172.)
- 6 (N. Y.). Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any expressed agreement or directions it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation so to do. (*The National Bank of Newburgh*, respondent, *v. Daniel Smith*, appellant, 66 N. Y., 271.)
- 7 (Pa., 1896). The duty which a bank holding a note owes to an indorser thereon to appropriate a deposit in the bank to payment of the note exists only where the maker of the note, at its maturity, has a deposit sufficient to pay it, and not previously appropriated to any other purpose, and does not apply to a deposit made after the maturity of the note, or to a deposit by a prior indorser, though he be in fact the principal debtor and the maker be an accommodation maker. (*First National Bank of Lockhaven v. Peltz*, 35 A., 218; 176 Pa. St., 513.)
- 8 (Pa., 1888). A firm made an assignment, parts of its assets consisting of a sum on deposit in defendant's bank. The assignee made demand for the deposit, which was refused, and he brought suit. After the demand, but before suit, a note against the assignors, held by the bank at the date of the assignment, matured. *Held*, that it could not be set off in the suit by the assignee. (*Chipman v. Ninth National Bank*, 13 Atl. Rep., 707; 120 Pa. St., 86.)
- 9 (Va., 1901). Where it was agreed that an agent should receive the proceeds of all sales of tobacco at a warehouse and procure the money to pay for all purchases made, he to be reimbursed before anything should be due the principal, and such agent deposited a sum in a bank in his own name as cashier, instructing the bank to pay the funds to no one else, and subsequently the balance due on the bank account was assigned by the principal to the agent, the bank was not entitled, as against the agent, to set off against the balance a sum due it from the principal. (*Nolting v. Nat. Bank of Virginia*, 3 Banking Cases, 211; 37 S. E. Rep., 804; 99 Va., 54.)

*Bank can not appropriate trust fund to satisfy individual debt of depositor.*

- 10 (Ill. Sup., 1895). Where a bank knows that money deposited with it to the general credit of a depositor is held in trust by such depositor, the bank has no right to apply such deposit to the payment of a note due to it from the depositor; 57 Ill. App., 107, reversed. (*Clemmer v. Drovers' National Bank*, 41 N. E., 728; 157 Ill., 206.)
- 11 (Nebr. Sup., 1902). A bank has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor. (*Globe Sav. Bank v. Nat. Bank of Commerce of New London, Conn.*, et al., 89 N. W. Rep., 1030; 4 Banking Cases, 397; 64 Nebr., 413.)
- 12 (Nebr. Sup., 1902). In a suit against a bank, entries on its books, made by its officers or bookkeeper in the regular course of its business, are admissible in evidence on behalf of the adverse party when in the nature of admissions. (*Ib.*)
- 13 (Nebr. Sup., 1902). A bank that appropriates a deposit made by a customer to reduce his indebtedness due the bank, knowing the deposit, or a part thereof, to be a trust fund, is liable to the true owner for a conversion of his money, and an action at law to recover the amount can be maintained. (*Ib.*)

## DEPOSITS—Continued.

## APPLICATION OF DEPOSIT ON CLAIM—continued.

- 14 (N. C. Sup., 1899). Where a bank knew that the surviving partner of a dissolved copartnership made deposits in such capacity, it was bound to know that he held them in trust for the payment of the debts of the dissolved firm, and, therefore, it had no right to apply them to the payment of a debt due it and created by the partnership prior to its dissolution. (*Hodgin v. People's Nat. Bank*, 124 N. C., 540; 2 B. C., 222.)

*When bank can appropriate trust funds to pay notes given by trustee.*

- 15 (N. Y. Sup., 1899). Where the trustee of an incompetent person deposits the trust funds in his personal bank account, and there is nothing to show that they are not the trustee's individual property, and the bank appropriates them as a part of such account, to satisfy notes given to it by the trustee, the succeeding trustee can not recover such funds in behalf of his ward's estate. (*Meyers v. New York County Nat. Bank*, 1 Banking Cases, 72.)

## APPLICATION OF DEPOSIT ON NOTE MADE PAYABLE AT BANK.

- 1 (Ala., 1898). Where it appears that a note was deposited in a bank where it was payable, and where there was on deposit, at its maturity, sufficient cash to the credit of the maker to pay it; and the cashier had been instructed by the maker to appropriate such funds to the payment of the note; and that on the morning of the day it fell due the maker tendered the cashier a check on such funds in the bank, after banking hours, in payment of the note, and was advised by the cashier that a check was unnecessary because the note had already been charged to the maker, and there was exhibited by the cashier to the maker the note stuck on the canceling spindle and stamped "Paid," such note is, in fact, paid in money, a verbal instruction by a depositor to the cashier of a bank to apply his money on deposit in a certain way being sufficient authority. (*First Nat. Bank of Cambridge, Ill., v. Hall et al.*, 1 Banking Cases, 198; 119 Ala., 64.)
- 2 (Ind.). Where a bank pays a note made payable at the bank it has a right to hold the note as a purchaser and to set it off against a balance due the depositor on a general account. (*Bedford Bank v. Acoam*, 125 Ind., 584.)

*Payment of note of insolvent depositor.*

- 3 (Mass. Sup., 1903). Plaintiff sent to defendant bank for collection and remittance a properly indorsed note of a depositor of defendant, who had directed it to pay his notes. On the day for payment, defendant's cashier, as such, drew his check to plaintiff's order for the amount of the proceeds, made a memorandum thereof on a block, wrote on the face of the note the defendant's name, that it was paid, and perforated it and put it in the files. He was then notified of the depositor's insolvency. *Held*, that the note was already paid, nothing remaining, besides entries of records on the books, but to remit the proceeds. (*Nineteenth Ward Bank v. First National Bank of South Weymouth*, 5 B. C., 697; 67 N. E., 670.)

*Right of bank to pay note without special authority.*

4. If a note be made payable at a bank the bank can not pay it out of the maker's deposit without being directed to do so.  
(Ill.) *Ridgely National Bank v. Patten and Hamilton*, 109 Ill., 479;  
(Tenn.) *Grisson v. Commercial National Bank*, 87 Tenn., 350.

*Contra.*

5. Making a note payable at a bank where the maker is a depositor amounts to a request that the bank pay it.  
(N. Y.) *Griffin v. Rice*, 1 Hilt., 184;  
(Ohio) *Francis v. People's National Bank*, 1 Ohio N. P., 281.
- 6 (N. Y.). But if the depositor notifies the bank not to pay the note the bank can not charge him with the amount if paid contrary to the notice. (*Egerton v. Fulton National Bank*, 43 How. Practice, 216.)

## DEPOSITS—Continued.

## TRANSFER OF DEPOSIT AS A GIFT.

- 1 (Conn., 1901). A mother deposited money in a bank, and received three pass books therefor, each of which recited that it was an account with the mother and a designated daughter, and was payable to both. The bank was informed at the time the deposit was made that the mother wished to retain control of the money until her death, when she wished it to go to her three daughters, and was informed that the deposit as made would accomplish the purpose. The mother had no intention of making a gift, and she retained the pass book, except when intrusted to the daughters for safe-keeping. *Held*, not to show a gift, but an attempted and void testamentary disposition, and hence the entire deposit would descend to her personal representatives. (Appeal of Main, 48 Atl. Rep., 965; 3 Banking Cases, 437; 73 Conn., 638.)
- 2 (Me., 1901). A gift inter vivos is not valid unless there is delivery to the donee or to some one for him, unless the donor parts with all present and future dominion and right of control over it, and unless the gift is intended to take immediate effect, to be complete as a transfer of title in *præsenti*, and is absolute and irrevocable. (*Hal-lowell Sav. Inst. v. Titcomb et al.*, 51 Atl. Rep., 249; 4 Banking Cases, 202.)
- 3 (Me., 1901). Where a depositor in a savings bank caused the deposit to be transferred on the books of the bank to his brother, and surrendered his old deposit book and took out a new one in the name of his brother, it was the same as if he had drawn the money and then deposited it in his brother's name; and that is the same as if he had then so deposited it for the first time. (*Ib.*)
- 4 (Minn., 1901). A gift of money in a bank, on deposit in the donor's name, may be legally executed by the person making such gift, although the credit of the deposit is not changed on the books of the bank, but continues in the name of the donor, provided, in the absence of fraud, there is some substantial act of the donor giving the donee the right to have such money and appropriate it. (*Murphy et al. v. Bordwell*, 85 N. W. Rep., 915; 3 Banking Cases, 433; 83 Minn., 54.)
- 5 (Tenn. Sup., 1903). A third person delivered to complainant his pass books in defendant bank, stating that he was going away and wanted her to have the money to his credit in the bank as evidenced by said books, and that if he did not return he wanted her to understand that it was hers, and said books were delivered to her to enable her to collect the same if he did not return. *Held*, not a valid gift inter vivos, being dependent on a contingency. (*Balling v. Manhattan Sav. Bank and Trust Co.*, 5 B. C., 757; 75 S. W. Rep., 1051.)

## DEPOSIT OF PUBLIC MONEYS, TRUST.

- 1 (U. S. C. C., 1896). A national bank, not designated as a depository of public moneys, which receives, under the permissive authority of law and the regulations of the Post-Office Department, deposits of money made by postmasters in their official capacity, thereby assumes a fiduciary relation to the Government, and becomes a bailee of the Government, so as to become directly responsible to it for any moneys which it knowingly or negligently allows the postmaster to withdraw by private check, or otherwise appropriate to his own use; and where, after the removal of the postmaster, he deposits a sum to make good a shortage in his balance, the bank can not apply it in discharge of a debt due it from him personally. (*United States v. National Bank of Asheville et al.*, 73 Fed. Rep., 379.)
- 2 (U. S. Ct. Cls., 1877). Designating a national bank as a depository of public moneys does not constitute it an agent of the Government, or render the Government liable for moneys lost by a failure of such bank. (*Branch v. The United States*, 1 N. B. C., 363.)

## DEPOSITS—Continued.

## DEPOSIT OF PUBLIC MONEYS, TRUST—continued.

- 3 (U. S. Ct. Cls., 1877). Such bank does not become a custodian of public moneys deposited with it, but it becomes a debtor to the United States the same as it does to other depositors for individual deposits. (Ib.)
- 4 (U. S. Ct. Cls., 1877). Certain moneys coming into the possession of the clerk of a Federal court pending a litigation were by him deposited in a national bank which had been designated as a depository of public moneys. The bank failed. *Held*, that the United States were not liable for the money so deposited. (Ib.)
- 5 (U. S. C. C., 1887). A postmaster at Lewiston, Idaho, with intent to defraud the Government, and without receiving any money, issued post-office orders upon the postmaster at Pueblo in favor of the Stock-growers' Bank. He mailed the orders to the bank, with a letter purporting to be written by one Wilson, and directed the bank to draw the money and hold it subject to said Wilson's order. The bank, without knowledge of the fraud, obtained the money as directed, but in doing so acted as a principal without disclosing their agency in the matter. The Lewiston postmaster, under the name of Wilson, subsequently drew the greater part of the money from the bank, and suit was afterwards brought against it by the United States to recover the money so obtained on the order. *Held*, that the bank was liable. (United States v. Stockgrowers' National Bank of Pueblo, 30 Fed. Rep., 912.)
- 6 (U. S. C. C., 1898). Where a national bank receives State funds subject to check, giving security therefor, and agreeing to pay interest on daily balances, the transaction is a deposit and not a loan. (State of Nebraska v. First National Bank of Orleans, 88 Fed. Rep., 947.)
- 7 (U. S. C. C., 1898). It is within the power of a national bank to give bond to secure State funds deposited with it, and sureties on such bond are bound thereby. (Ib.)
- 8 (U. S. C. C. A., 1900). It was charged that a member of a banking firm, who was also the treasurer of a quasi municipal corporation, misapplied the moneys of such corporation deposited by him in a national bank; and that the bank, through its officers, knowingly, and for its own advantage, permitted and participated in a diversion of such fund to the discharge of the liabilities of the firm to itself, when the latter was insolvent. *Held*, that such charge was sustained by the evidence, and that the bank was liable for the amount so diverted. (McNulta v. West Chicago Park Com'rs., West Chicago Park Com'rs. v. McNulta, 2 Banking Cases, 764; 99 Fed. Rep., 900.)

*Treasurer of school district may deposit school funds in national bank.*

- 9 (Iowa Sup., 1903). Code 1873, section 1747, provides that a school treasurer shall hold all moneys belonging to the district, and shall pay out the same on the order of the president, countersigned by the secretary. *Held*, that the word "hold," as so used, did not require that the treasurer should keep the moneys of the district in his physical possession at all times, and did not prohibit the treasurer from making a general deposit of the district's funds in a solvent bank to his credit as treasurer. (Hunt v. Hopley, 5 B. C., 734; 95 N. W. Rep., 205.)

*Jurisdiction in actions for public money on deposit.*

- 10 (U. S. C. C., 1896). By reason of this trust relation, equity has jurisdiction of a bill by the Government to require an account and settlement of the moneys so deposited with it; and this remedy is not affected by the fact of a cumulative remedy at law against the postmaster on his official bond. (United States v. Nat. Bank of Asheville et al., 73 Fed. Rep., 379.)

## DEPOSITS—Continued.

## MISCELLANEOUS.

*Liability for deposit for transmission to another bank.*

- 1 (Ill.). Upon deposit in a city bank of funds for transmission to the credit of a country bank, for the use of the depositor, the city bank becomes a trustee of the depositor; and where the country bank, by reason of its failure before the deposit was made, becomes unable to receive the deposit, the city bank is liable to the depositor in an action for money had and received, for the amount of the deposit.  
(Ill.) Union Stockyards National Bank v. Dumond, 37 N. E., 863; 150 Ill., 501;  
(Ill.) Dumond v. Merchants' National Bank, 37 N. E., 864; 150 Ill., 515.
- 2 (Ill.). The fact that the city bank deposited the money with another city bank, which was the correspondent of the country bank, does not exempt the former bank from such liability, where the depositor was unacquainted with the custom of the banks in making such deposits, and did not consent thereto. (Ib.)
- 3 (Ill.). Nor will the city bank in which the money was finally deposited be liable therefor, at the suit of the depositor, where the money was left with it with instructions to credit it to the country bank, generally, without any intimation that it was to be credited to that bank as the money of the depositor. (Ib.)

*Where deposit payable.*

- 4 (Ind. T., 1896). Money deposited in a bank without stipulation as to place of payment is payable to the depositor at the bank. (McBee v. Purcell National Bank, Ind. T., 37 S. W., 55; 1 Ind. T., 288.)

*When act of cashier as to deposit binds bank.*

- 5 (Ky., 1884). Where the cashier and general manager of a bank undertook to make investments for a depositor, and exhibited to the depositor, from time to time, statements, taken from the books of the bank, purporting to show investments made by the bank for him, it will be presumed that the officer of the bank was acting for the bank, and not as special agent for the depositor, and the bank will be required to account for the deposits or the investments. (Bobb v. Savings Bank of Louisville et al., 64 S. W. Rep., 494; 3 Banking Cases, 760.)

*Delivery of deposit slip does not assign deposit.*

- 6 (N. Y., 1892). A deposit slip issued by a banker, acknowledging the receipt of the amount of money therein named, is intended merely to furnish evidence, as between the depositor and the bank, that on a given day there was deposited a given sum, and not that such sum remains on deposit; and hence the delivery of a deposit slip to a third person by the depositor does not operate as an assignment of the deposit. (First National Bank v. Clark, N. Y. App., 32 N. E., 38; 134 N. Y., 368.)
- 7 (N. Y., 1892). A conversation between a bank depositor and a third person, to whom he had delivered the deposit slip, and in whose favor he had drawn a check for the amount, in which he stated that the deposit would not be available for ten days, and that he wanted the check discounted immediately, which was accordingly done, and the money paid him by such third person, does not, as a matter of law, operate as an assignment of the deposit to such third person; and a finding by the jury that it did not will not be disturbed on appeal. (Ib.)

*Checks, how applied when title to deposit is in dispute.*

- 8 (N. Y.). Where several deposits in bank have been made on the same account, and the title to one of the deposits is disputed, checks drawn on the account will be first applied to the deposits not in dispute. (Hauptmann v. First National Bank (Sup.), 31 N. Y. S., 364.)

## DEPOSITS—Continued.

## MISCELLANEOUS—continued.

*Fraud of bank officers in issuing deposit certificate.*

- 9 (Pa.). Defendant, who had money on deposit in a national bank, when demanding payment thereof was induced by an officer of the bank to sign a promissory note, which was represented to him to be a receipt for the money. He was unable to read English. *Held*, that he was not liable to the bank upon the note. (*Resh v. First National Bank of Allentown*, 93 Penn. St., 397; 3 N. B. C., 724.)
- 10 (Pa.). Plaintiff, who was unable to read, deposited money in a national bank and took a certificate of deposit therefor, which the officers of the bank represented was a certificate of the bank. It was, on its face, the certificate of a private banking firm, composed of some of the officers of the bank. *Held*, that the bank was liable for the amount of the deposit. (*Zeigler v. First National Bank of Allentown*, 93 Penn. St., 393; 39 Am. Rep., 758; 2 N. B. C., 721.)

## CERTIFICATE OF DEPOSIT.

## IN GENERAL.

*Certificate of deposit bank's promissory note.*

1. An ordinary certificate of deposit is the bank's promissory note, payable on demand.  
 (Cal.) *Brummagim v. Tallent*, 29 Cal., 503;  
 (Conn.) *Kilgore v. Bulkley*, 14 Conn., 362;  
 (Ill.) *Swift v. Whitney*, 20 Ill., 144;  
 (Mich.) *Beardsley v. Webber*, 104 Mich., 88;  
 (N. Y.) *Mitchell v. Easton*, 64 N. Y., 155;  
 (Ohio) *Citizens' National Bank v. Brown*, 45 Ohio State, 39.

*Certificate of deposit good until presented.*

- 2 (N. Y. Sup. Ct.). Where a bank issues a certificate of deposit, payable on its return properly indorsed, it is liable thereon to a bona fide holder to whom it was transferred seven years after its issue, notwithstanding a payment thereof to the original holder. Such certificate is not dishonored until presented. (*National Bank of Fort Edward v. The Washington County National Bank*, 5 Hun., 605.)
- 3 (Cal., 1900). A certificate of deposit is not a promissory note under California Civil Code, section 3095, reciting that "bills of exchange," "promissory notes," and "certificates of deposit" are classes of negotiable instruments, and hence a bank stockholder having a certificate of deposit does not loan the money to the bank, but is a mere stockholder depositor, within act of April 11, 1862, section 10, providing that the capital stock of savings banks shall be security for nonstockholding depositors. (*Murphy v. Pacific Bank*, 62 Pac. Rep., 1059; 3 Banking Cases, 702; 130 Cal., 542.)

*Liability of indorser.*

- 4 (Mich.). An indorser on a certificate of deposit assumes the same liability as the indorser on a promissory note. (*Cate v. Patterson*, 25 Mich., 191.)

*Value of certificate, how determined.*

- 5 (Mo.). The value of the certificate is governed by the amount stated in the body and not by the figures in the margin. (*Payne v. Clark*, 19 Mo., 152.)

*Liability of bank for certificate issued by its officers when not acting for the bank.*

- 6 (N. Y., 1880). Where a national bank was in the habit of receiving money on deposit and issuing certificates, sometimes in its own name and sometimes in the name of its president, it is liable to a depositor who took a certificate issued by the president personally, but which

## DEPOSITS—Continued.

## CERTIFICATE OF DEPOSIT—IN GENERAL—continued.

the depositor believed to be an obligation of the bank and would not have taken otherwise. (*West v. Elmira Bank*, 20 Hun., 408.)

- 7 (Pa., 1880). A depositor asked for a certificate of deposit drawing interest for a portion of his deposit. The teller gave him a certificate issued by a private banking firm composed of the managing officers of the bank and told him that this was the bank's certificate. *Held*, that the bank was liable. (*Steckel v. First National Bank of Allentown*, 93 Pa. State, 376.)

- 8 (Pa.). A business man inquired of a bank president if the bank paid interest on deposits. He was informed that it did not, but that he would give him a certificate of a firm that would. He also informed him that the firm owned the bank and that he could get his money of the bank at any time. The firm failed and it was held that the bank was not liable. (*Allentown Bank v. Williams*, 100 Pa. State, 123.)

- 9 (Utah, 1892). A bank is not liable on a certificate of deposit issued before its organization and signed as cashier by one who afterwards became such. (*Long v. Citizens' Bank*, 8 Utah, 104.)

*Payment on unauthorized indorsement—no payment.*

- 10 (Cal.). Payment by the bank of a certificate of deposit upon an unauthorized indorsement is no payment. (*Honig v. Pacific Bank*, 73 Cal., 464.)

*Bank's right to offset.*

- 11 (Mich.). Certificates of deposit are subject to same rule as other general deposits as to rights of set-off. (*Newberry v. Trowbridge*, 13 Mich., 263.)

*Certificates of deposit, re-formation of.*

- 12 (Iowa, 1895). Plaintiff made a certain payment to defendant bank, and received in exchange a note signed by a firm composed of the officers of the bank, and the business of which was transacted in the bank's office. He subsequently gave a check to his wife, which was also exchanged at the bank office for a similar note. Plaintiff and his wife could both read and write, and had transacted considerable business with the banks. Plaintiff retained the notes for two years, and upon the failure of the firm began suit to re-form the notes and change them into certificates of deposit of the bank on the ground that he intended to deposit his money with the bank. *Held*, that plaintiff was not entitled to a decree. (*Murphy v. First National Bank of Cedar Falls (Iowa)*, 63 N. W., 702; 95 Iowa, 325.)

*When not in violation of section 5183, United States Revised Statutes.*

- 13 (Mass., 1886). A certificate of deposit issued by a national bank, payable to the order of the depositor on return of the certificate properly indorsed and understood between the bank and the depositor not to be payable until a future day agreed upon, is not in violation of the national banking act. (*Hunt, Appellant*, 141 Mass., 515; 3 N. B. C., 474.)

- 14 (Ohio). A certificate of deposit representing an actual loan is not a post note within the meaning of section 5183, Revised Statutes. (*Logan National Bank v. Williamson*, 2 Cin. Ct. Rep. (Ohio), 118.)

*When void for want of consideration.*

- 15 (U. S. C. C., 1893). Certain persons, directors of a savings and of a national bank, procured money from the former on notes made by a third person to them for the payment of stock of the national bank issued in the name of such third person for their benefit. These persons were behind in their accounts with the national bank, and the savings bank allowed them to overdraw their accounts with it to a large amount, which was used in settling their accounts with the national bank. Thereafter the savings bank delivered the notes



## DEPOSITS—Continued.

## CERTIFICATE OF DEPOSIT—IN GENERAL—continued.

and the check to the national bank, which issued to it a certificate of deposit for an amount covering the whole amount represented by them. *Held*, that this certificate of deposit was without consideration and void, and any loss accruing to the savings bank by virtue of the transactions was due to the fraud or incompetency of its own officers. (*Murray v. Pauly*, 56 Fed. Rep., 962.)

*Certificate of deposit as evidence of sum deposited.*

- 16 (Ill.). A certificate of deposit is evidence of so high and satisfactory a character as to the sum deposited that to escape its effect the maker must overcome it by clear and satisfactory evidence. Where the testimony, aside from the certificate, is balanced as to the amount deposited, the certificate will turn the scale. (*First National Bank of Lacon v. Myers*, 83 Ill., 507.)

*Stub from which certificate is taken, as evidence.*

- 17 (U. S. C. C., 1892). A person depositing money in a bank accepted from the cashier a certificate of deposit which made no mention of interest, but with a verbal agreement that interest should be paid. The cashier at the same time indorsed a memorandum of the rate of interest on the stub from which the certificate was taken. *Held*, that the stub should be read with the certificate as evidence of the entire contract. (*Thomson v. Beal*, 48 Fed. Rep., 614.)

*Nature of certificate of deposit.*

- 18 (Md., 1896). A savings bank provided by its by-laws for three classes of depositors—weekly depositors who were stockholders on the deposit of a minimum sum, special depositors, and irregular depositors. Plaintiff made a special deposit, receiving a certificate acknowledging the receipt of the money on special deposit at a specific rate of interest, if not drawn out within one year. *Held*, that the special deposit was in effect, a loan, creating an indebtedness on the part of the bank; and the weekly depositors having, as stockholders, received benefits from the loans, in the way of increased dividends, they are estopped from pleading that such loans were void, as being beyond the power of the corporation. (*Heironimus v. Sweeney* (Md.), 34 A., 823; *Edwards v. Same*, ib.; 83 Md., 146.)

*When trust companies may issue.*

- 19 (U. S. C. C., 1900). In the absence of statutory provisions on the subject, a trust company authorized to receive money on deposit has lawful authority to issue certificates of deposit therefor in the usual form. (*Bank of Saginaw v. Title and Trust Company of Western Pennsylvania*, 105 Fed. Rep., 491.)

*Certificate signed by third person, rights of parties.*

- 20 (N. Y., 1902). When a certificate of deposit of a banking firm is signed by a third party to give it credit, after his death and the failure of the firm, as he is liable as ostensible partner and as surety, if his estate is insufficient to pay his individual and firm debts in full, the holder of the certificate is entitled to be paid out of the estate before any part thereof can be applied on the debts of the firm. (*In re Baldwin's Estate*, 63 N. E. Rep., 62; 170 N. Y., 156.)
- 21 (N. Y., 1902). Where an active member of a banking firm makes a deposit with it as executor in the absence of a written agreement, he can not recover as against one who signs certificates of deposit of the firm to give it credit; such executor knowing at the time that no partnership in fact existed, so as to render such person liable to him for the deposit. (*Ib.*)

*Certificate of deposit of public moneys.*

- 22 (U. S. C. C. A., 1900). The fact that certificates of deposit issued by a national bank to a State treasurer in his official capacity for money of the State deposited were surrendered by his successor in office, who

## DEPOSITS—Continued.

## CERTIFICATE OF DEPOSIT—IN GENERAL—continued.

had the amount credited in his general account as treasurer, can not affect the liability of the bank to the State for the money actually deposited, and which was never repaid, nor does it justify its receiver in contesting the claim of the State or its treasurer therefor, where there is no defense to such claim on its merits. (*McDonald v. State of Nebraska*, 101 Fed. Rep., 171.)

*Presentation of certificate, demand, action.*

- 23 (N. Y., 1901). When a depositor in a bank failed to produce or surrender his certificates of deposit, which had not been lost, on making demand for their payment, and failed to produce them on the trial of an action for the amount of the certificates, he can not recover, since the bank is not bound to pay the deposits, except on the production and surrender of the certificates properly indorsed. (*Cottle et al. v. Marine Bank of Buffalo*, 59 N. E. Rep., 736; 3 Banking Cases, 218; 166 N. Y., 53.)
- 24 (N. Y., 1901). Though certificates of deposit in a bank are payable on demand when properly indorsed, the bringing of an action against the bank for the amount of the certificates is not a sufficient demand to entitle the depositor to recover, since the demand must be by presentation of the certificates properly indorsed. (*Ib.*)
- 25 (N. Y., 1901). Though there was no evidence upon which the trial court might have based a finding, yet, where the judgment and findings of the trial court were unanimously affirmed by the appellate division, the court of appeals can not supply the finding. (*Ib.*)

*Wrongful detention of certificate, measure of damages.*

- 26 (U. S. C. C., 1882). The defendants unlawfully detained a certificate of deposit of the value of \$2,000 from the plaintiff. *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal to the recovery, and this without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right. (*Sleppy v. Bank of Commerce and others*, 17 Fed. Rep., 712.)

## NEGOTIABILITY OF CERTIFICATES OF DEPOSIT.

- 1 (U. S. C. C., 1900). The courts of the United States are not controlled by the decisions of the State courts on questions of general commercial law, and a Federal court will follow the decisions of the Supreme Court as to the negotiability of an instrument, notwithstanding a contrary holding by the courts of the State where the transaction took place. (*Bank of Saginaw v. Title and Trust Co. of Western Pennsylvania*, 105 Fed. Rep., 491.)
- 2 (U. S. C. C., 1900). A certificate of deposit in the ordinary form, payable to the order of the depositor, is a negotiable instrument possessing the qualities of a negotiable promissory note. (*Ib.*)
- 3 (Colo., 1898). Certificates of deposit are negotiable, and where a recovery is sought thereon present ownership must be proved; and they must be produced or their destruction or loss be established; and the necessity for such proof is not obviated by the introduction in evidence of a list of verified claims presented to the assignee of the bank and allowed by the court. (*Zang et al. v. Wyant et al.*, 1 Banking Cases, 349; 25 Colo., 551.)
4. An undorsed certificate of deposit is not negotiable.  
(*Ind.*) *National State Bank of Lafayette v. Ringel*, 51 Ind., 393;  
(*Ohio*) *Citizens' National Bank v. Brown*, 45 Ohio State, 39.
- 5 (Me., 1900). A certificate of deposit payable in current funds to the order of the depositor on return of the certificate properly indorsed, with interest at 3 per cent per annum if on deposit six months, is

## DEPOSITS—Continued.

## NEGOTIABILITY OF CERTIFICATES OF DEPOSIT—continued.

- negotiable. (*Hatch v. First Nat. Bank of Dexter*, 3 Banking Cases, 191; 94 Me., 348; see notes at end of case.)
- 6 (Me., 1900). The term "current funds," when used in commercial transactions as the expression of the medium of payment, is construed to mean current money, or funds which are current by law as money. (Ib.)
  - 7 (Me., 1900). Making such a certificate payable on its return properly indorsed creates no such contingency as to payment as affects its negotiability. The language used expresses no more than the law implies as the duty of the holder in the absence of any such stipulation. (Ib.)
  - 8 (Me., 1900). The amount of payment is not rendered uncertain by such an interest clause. (Ib.)
  - 9 (Me., 1900). If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate. (Ib.)
  - 10 (Me., 1900). If payment be not demanded until after six months, the amount payable is equally certain; it is the face of the certificate and interest to time of payment. The sum payable at any given time is ascertainable on the face of the certificate, and that is sufficient. (Ib.)
  - 11 (Nebr.). An overdue certificate of deposit is subject to the same defenses as other overdue papers. (*First National Bank v. Security National Bank*, 34 Nebr., 71.)
  - 12 (N. Mex., 1901). The rule which applies to negotiable instruments has no application to a certificate of deposit until the certificate has been indorsed and transferred by the original holder. Then a new relation arises between all parties, which must be tested by the rules and customs of the law merchant. (*Bank of Commerce v. Harrison*, 66 Pac. Rep., 460.)
  - 13 (N. Y., 1902). A certificate of deposit signed by a banking firm, and by one who allowed his name to be used to give the certificate credit, though not a member of the firm, is a negotiable instrument. (In re Baldwin's estate, 63 N. E. Rep., 62; 170 N. Y., 156.)
  - 14 (Ohio). An overdue certificate of deposit is not negotiable. (*Citizens' National Bank v. Brown*, 11 Weekly Law Bulletin, 220.)

## WANT OF CONSIDERATION, FALSE CERTIFICATE, DECEIT, REMEDY.

- 1 (U. S. C. C. A., 1901). An instrument executed by the cashier of a bank which merely certifies that on a prior date named a party had a stated sum on deposit to its credit in the bank, but which contains no words of negotiability or promise to pay, is not a certificate of deposit or an obligation of the bank upon which an action can be maintained, but is merely evidentiary in character. (*Modern Woodmen of America v. Union Nat. Bank of Omaha*, 108 Fed. Rep., 753.)
- 2 (U. S. C. C. A., 1901). Z was head banker of plaintiff, which was an incorporated insurance order, and as such had the custody of its funds. After the expiration of his term of office he retained certain of such funds, although they had been demanded by plaintiff, and kept the same on deposit in a bank in Grand Island, Nebr., of which he was a stockholder and director. The cashier of such bank wrote to the cashier of the defendant bank, which was its Omaha correspondent, explaining that his bank had certain money of plaintiff on deposit; that on a certain date plaintiff would issue a statement, and, for reasons concerning his own bank, he did not wish such deposit to appear therein. He requested defendant to give plaintiff a fictitious credit for the amount on said date, inclosing his note for the amount to be credited, and also a check for the same amount, to be used in paying the note a day or two later. He further stated that the arrangement had been fully explained to and was understood by Z and plaintiff's directors. The arrangement was carried out, and defendant's

## DEPOSITS—Continued.

## WANT OF CONSIDERATION, FALSE CERTIFICATE, DECEIT, REMEDY—continued.

cashier, a few days later, on request, issued a certificate stating that on the date named plaintiff had such sum on deposit in his bank. This certificate was sent to the Grand Island bank, and by it given to Z, who forwarded it to plaintiff. Three weeks later the Grand Island bank failed, and Z and his sureties were also insolvent. Plaintiff, having made demand, brought action against defendant to recover the amount, suing both on the certificate and for money had and received. *Held*, that the certificate executed by defendant's cashier was not an obligation that would support an action, nor would the action lie on an implied promise, since defendant did not in fact receive any money on deposit; that it was not estopped to show such facts by the certificate, which was issued only as an accommodation to its correspondent and without any intention to deceive plaintiff or knowledge that it would be so used, but, on the contrary, with the understanding that plaintiff's officers had full knowledge of the transaction; that, when there is nothing in the circumstances of a case indicating that one making a false statement intended that the complaining party should act on it, the party making such statement is not estopped from showing the truth. (Ib.)

- 3 (U. S. C. C. A., 1901). Where a bank issued a certificate falsely stating that on a certain date it had on deposit a sum to the credit of a party, and it was claimed that the certificate misled the party and occasioned damage, but it appeared that such damage was much less than the amount of the certificate: *Held*, that the proper remedy was an action *ex delicto* for deceit, rather than in *assumpsit* to recover the amount of the certificate. (Ib.)

*Payment when bank has notice that depositor's indorsement was procured by a trick.*

- 4 (Mo. Appls., 1903). Where the indorsement of a certificate of deposit is procured by a trick practiced on the depositor, and the bank issuing it pays it to the indorsee with notice of the facts, the depositor or his assignee may recover from the bank the amount of the certificate. (*Currey v. Joplin Sav. Bank*, 5 B. C., 740; 74 S. W. Rep., 1036.)

## PAYMENT OF LOST OR STOLEN CERTIFICATES OF DEPOSIT.

- 1 (U. S.). A certificate of deposit issued by plaintiff bank to one who could not write his name was stolen from the payee. The thief presented it to the defendant, who, without identification, took the certificate, with the thief's mark indorsed thereon and witnessed, collected the money of plaintiff, and paid the thief. *Held*, that the plaintiff in paying it was entitled to assume that the payee had been properly identified, and having paid the amount to the real payee was entitled to recover of defendant. (*State National Bank v. Freedmen's Savings and Trust Co.*, 13 Fed. Cases, 324 [2 Dill, 11].)
- 2 (Ind.). Suit against a bank upon a stolen certificate of deposit given by the defendant to the plaintiff, reciting that he had deposited in said bank a certain number of dollars, payable to his order in current funds on the return of the certificate properly indorsed. *Held*, that the instrument should be regarded as the promissory note of the bank, assignable under the statute, but that it was not negotiable as an inland bill of exchange, being made payable, not in money, but "in current funds." (*National State Bank of Lafayette v. Ringel*, 51 Ind., 393.)
- 3 (Ind.). *Held*, therefore, that the payee could recover on said stolen certificate without giving a bond to indemnify the bank against a subsequent claim thereunder by another person. (Ib.)
- 4 (Ohio). When a negotiable certificate of deposit is lost before indorsement the finder can have no title, and the depositor may recover from the bank without executing an indemnity bond, even though the certificate states that the same is payable "on return of this certificate." (*Citizens' National Bank v. Brown*, 45 Ohio Stat., 39.)

## DEPOSITS—Continued.

## SPECIAL DEPOSITS.

## WHAT ARE SPECIAL DEPOSITS

- 1 (U. S.). A special deposit is created whenever a particular thing is delivered to a bank to be returned upon demand. (*In re Mutual Building Soc.*, 2 Hughes, 374.)
- 2 (U. S. C. C. A., 1898). A debtor deposited in a bank in New York the amount due from him to a creditor in Helena, Mont. The bank in New York telegraphed the Bank of Helena to pay the debt and charge to it. The Bank of Helena refused to pay in any way but by exchange on New York, which the creditor refused to accept, and also refused to permit the amount to be placed to his credit. The creditor then accepted a draft on the New York bank, to be a payment if honored. The Bank of Helena suspended, and the draft was not paid. *Held*, that the refusal of the creditor to accept the draft in payment or to permit the amount to be placed to his credit made it a special deposit subject to the law governing such deposits. (*Moreland v. Brown*, 86 Fed. Rep., 257.)
3. Money given to a bank for any special purpose is a special deposit. (U. S. C. C., 1894) *Massey v. Fisher*, 62 Fed. Rep., 958; (Kans.) *Ellicott v. Barnes*, 31 Kans., 170; (Mo.) *Harrison v. Smith*, 83 Mo., 210.
4. Every deposit of money is general unless expressly made special or deposited in some particular way. (Ill.) *Ward v. Johnson*, 95 Ill., 215; (La.) *Matthews v. Creditors*, 10 La. Ann., 342.
- 5 (N. Y.). The term "special deposits" includes money, securities, and other valuables delivered to banks to be specifically kept and delivered. It is not confined to securities held by the banks as collateral to loans. (*Pattison v. The Syracuse Nat. Bank*, 80 N. Y., 82.)

## WHAT NOT A SPECIAL DEPOSIT.

- 1 (Mo., 1900).<sup>o</sup> Where a guardian deposited a trust fund with a bank as an ordinary depositor, and it was mingled with the other funds of the bank upon the insolvency of the bank, the cestui qui trust was not entitled to a preference over other creditors merely because the bank was aware that the fund was a trust fund, but in order to entitle the cestui qui trust to a preference it must have been a special deposit creating a trust relation, and not merely the relation of creditor and debtor. (*Paul v. Draper*, 3 Banking Cases, 50; 158 Mo., 197.)
- 2 (Nebr., 1899). The owner of a sum of money on a general deposit in a bank at the time of its failure is not entitled to a preferred claim against the assets in the hands of its receiver. (*Schmelling v. State et al.*, 1 Banking Cases, 670; 57 Nebr., 562.)

## RECEIVING SPECIAL DEPOSITS INCIDENTAL TO BANKING BUSINESS.

- 1 (U. S. Sup. Ct., 1879). A national banking association may receive special deposits. The provision in section 5228, Revised Statutes, authorizing an association "to deliver special deposits," implies that it may receive them as a part of its legitimate business; and this implication is as effectual as an express declaration to the same effect would have been. (*First National Bank of Carlisle v. Graham*, 100 U. S., 699.)
- 2 (U. S. Sup. Ct., 1879). It is competent for a national bank to receive special deposits or securities, either on a contract of hiring, or without reward, and it will be liable for a greater or less degree of negligence accordingly. (*Ib.*)
3. National banks are by implication given the power to receive special deposits. (Md.) *Planters' Bank v. Farmers' Bank*, 8 Gill & J., 449; (Mass.) *Watson v. Phoenix Bank*, 8 Met., 217.

## DEPOSITS—Continued.

## RECEIVING SPECIAL DEPOSITS INCIDENTAL TO BANKING BUSINESS—continued.

4. If a bank is accustomed to receive special deposits it will be held liable for them whether it had power to receive them or not.  
(Ga.) *Chattahoochee National Bank v. Schley*, 58 Ga., 369;  
(Ohio) *First National Bank v. Zent*, 39 Ohio St., 105;  
(Pa.) *First National Bank of Carlisle v. Graham*, 97 Pa., 106.
- 5 (N. Y.). The power to receive special deposits is incidental to the business of banking. (*Pattison v. The Syracuse National Bank*, 80 N. Y., 82.)
- 6 (N. Y.). National banks, therefore, have power to receive special deposits gratuitously or otherwise; and, when received gratuitously, they are liable for their loss by gross negligence. (Ib.)

*Contra.*

- 7 (Vt. Sup., 1875). The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of national banks; and the cashiers of such banks have no power to bind them on any express contract accompanying, or implied contract arising out of, such taking. (*Wiley v. The First Nat. Bank of Brattleboro*, 47 Vermont, 546; 1 N. E. C., 905.)

## SPECIAL DEPOSITS—DEGREE OF CARE REQUIRED OF BANK.

*Bank required to use reasonable care.*

- 1 (U. S. Sup. Ct., 1891). The reasonable care, which a bailee of another's property intrusted to him for safe-keeping without reward must take, varies with the nature, value, and situation of the property and the bearings of surrounding circumstances on its security. (*Preston v. Prather*, 137 U. S., 604.)
- 2 (U. S. Sup. Ct., 1891). Persons depositing valuable articles with banks for safe-keeping without reward have a right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within; that whenever ground for suspicion arises an examination will be made to see that they have not been abstracted or tampered with; that competent men, both as to ability and integrity, for the discharge of these duties will be employed, and that they will be removed whenever found wanting in either of these particulars. (Ib.)
- 3 (U. S. Sup. Ct., 1891). When bonds originally deposited with a bank for safe-keeping are by agreement of the bailor and bailee made a standing security for the payment of loans to be made by the bank to the owner of the bonds, the bailee becomes bound to give such care to them as a prudent owner would extend to his own property of a similar kind. (Ib.)
- 4 (Ala., 1897). A bank which receives certain transfers of land certificates with instructions to deliver them to a certain person upon the payment of a certain sum is not a gratuitous bailee thereof, and is bound to use ordinary care in keeping them. (*First Nat. Bank of Birmingham v. First Nat. Bank of Newport*, 22 So. Rep., 976; 116 Ala., 520.)
- 5 (Ohio Sup., 1883). Where a national bank has been accustomed to receive United States bonds as special deposits gratuitously, it is liable for any loss thereof occurring through the want of that degree of care which good business men would exercise in keeping property of such value. (*First National Bank of Mansfield v. Zent*, 39 Ohio St., 105; 3 N. B. C., 698.)
- 6 (Ohio Sup., 1883). A demand of said bonds, and a refusal by the bank to deliver the same, with no other explanation of such refusal than the statement that the bank has no such bonds in its possession, furnish sufficient proof of loss by such negligence as will render the bank liable therefor. (Ib.)

*Liable for gross negligence, what is.*

- 7 (U. S. Sup. Ct., 1879). A national bank received for safe-keeping Government bonds belonging to G. From time to time the cashier of the

## DEPOSITS—Continued.

## SPECIAL DEPOSITS—DEGREE OF CARE REQUIRED OF BANK—continued.

- bank cut off the coupons and collected the same, placing the amount to the credit of G., paying it to her when demanded. For this service the bank received no compensation. Through gross negligence of the bank or its officers the bonds were lost. *Held*, that the bank was liable. (*First National Bank of Carlisle v. Graham*, 100 U. S., 699; 2 N. B. C., 64.)
- 8 (U. S. Sup. Ct., 1891). Gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that negligence existed is a question of fact for the jury to determine or to be determined by the court where a jury is waived. (*Preston v. Prather*, 137 U. S., 604.)
- 9 (U. S. Sup. Ct., 1891). In this case persons engaged in business as bankers received for safe-keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination as to the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited. *Held*, that the bankers were guilty of gross negligence and were liable to the owner of the bonds for their value at the time they were stolen. (*Ib.*)
10. A national bank is liable for damages occasioned by the loss through gross negligence of a special deposit made in it with knowledge and acquiescence of its officers and directors.  
 (U. S. Sup. Ct., 1879.) *First National Bank of Carlisle v. Graham*, 100 U. S., 699;  
 (Ga.) *The Chattahoochee National Bank v. Schley*, 58 Ga., 369; 1 N. B. C., 379;  
 (N. Y.) *Pattison v. The Syracuse National Bank*, 80 N. Y., 82.
- 11 (U. S. Sup. Ct., 1886). Where a national bank was broken into by burglars, and property belonging to it and to others was taken therefrom, the bank may take measures to recover its own; and it may lawfully undertake to act also for others thus jointly concerned with itself; and want of proper diligence, skill, and care in the performance of such an undertaking would render it liable to respond in damage for failure. (*Wylie v. Northampton National Bank*, 119 U. S., 361; 3 N. B. C., 188.)
- 12 (Ga., 1893). Where the speculations in stocks and bonds on margins of a bank cashier, of which the president had knowledge, were such that such president must have known of the cashier's dishonesty, the bank is liable for bonds deposited with it as a gratuitous bailee, which the cashier converted to his own use. (*Merchants' National Bank of Savannah v. Guilmartin* (Ga.), 21 S. E., 55; 93 Ga., 503.)
- 13 (Ga., 1895). In an action against a bank to recover the value of a special deposit embezzled by the cashier, diligence in the keeping of the deposit was not shown by evidence that under similar circumstances defendant intrusted its cashier with like property of its own. (*Merchants' National Bank v. Carhart* (Ga.), 22 S. E., 628; 95 Ga., 394.)
- 14 (Mass.). An action against a bank for the conversion or the loss by gross negligence of valuable articles deposited with it as a bailee without hire can not be sustained on evidence from which the inference that the articles were stolen by servants of the bank, selected and continued in its employment without negligence, who in the proper course of business had access to them, is equally deducible with any other inference. (*Smith v. First National Bank of Westfield*, 99 Mass., 605.)
- 15 (N. J. Errors and Appeals, 1903). In a suit against a bank by a gratuitous bailee to recover the value of securities left with it, and which have been stolen by one of its employees, a want of ordinary care on the part of the bank not appearing, the bank is not liable for the loss of the plaintiff. (*Smith v. Elizabethport Banking Co.*, 5 B. C., 755; 55 Atl. Rep., 248.)

## DEPOSITS—Continued.

## SPECIAL DEPOSITS—DEGREE OF CARE REQUIRED OF BANK—continued.

- 16 (N. Y. Appls., 1875). A gratuitous bailee is only liable for gross negligence; he is not bound to any special or extraordinary measures to protect the property, and the negligence with which he can be charged, or which is the proper subject of evidence, is only that which is connected with and directly contributes to the loss. (*First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y., 278; 1 N. B. C., 728.)
- 17 (Pa. Sup., 1879). A national bank, receiving a special deposit for safe-keeping, without reward, is liable only for gross negligence; the burden of proof is on the plaintiff, and gross negligence is not the omission of that care which every attentive and diligent person takes of his own goods, but the omission of that care which the most inattentive takes. (*First National Bank of Allentown v. Rex*, 89 Pa. St., 308; 2 N. B. C., 373.)
- 18 (Pa. Sup., 1874). In an action to recover of a bank the value of the bonds deposited for safe-keeping by plaintiff and stolen by the teller of the bank, *held*, that the bank being a gratuitous bailee was not liable, although an examination of the teller's accounts, after the theft, proved them to have been falsely kept, and showed that he had been abstracting funds for two years, and although it was known to the president of the bank that he had dealt once or twice in stocks. Mistaken confidence is not a ground of liability in such cases. (*Scott v. Nat. Bank of Chester Valley*, 1 N. B. C., 864; 72 Pa. St., 471.)
- 19 (Pa. Sup., 1876). Whether or not a national bank has the power to take bonds, etc., on deposit for safe-keeping, it is not liable for the loss of such property so taken without compensation, unless it has been guilty of gross negligence contributing to the loss. (*De Haven v. Kensington Nat. Bank*, 81 Pa. St., 95; 1 N. B. C., 882.)
- 20 (Pa. Sup., 1875). In an action against a national bank to recover bonds deposited with it for safe-keeping, without compensation, and which the bank alleged were stolen from its vaults, *held*, (1) that the bank was liable only for gross negligence; (2) that its failure to give prompt notice of the robbery was a question for the jury as bearing on the question of negligence, and (3) that while the voluntary act of the cashier in receiving the funds would not subject the bank to liability, yet if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the defendants would be held bound. (*First National Bank of Carlisle v. Graham*, 79 Pa. St., 106; 1 N. B. C., 875.)
- 21 (Vt.). The plaintiff delivered to the defendant bank \$4,000 of United States bonds and received this writing: "Received of J. D. Whitney four thousand dollars, for safe-keeping as a special deposit. S. M. Waite, C." *Held*, that it was a naked deposit without reward; that the defendant would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith; that it was answerable only for fraud or for gross negligence; that the law demands good faith and the same care of the plaintiff's bonds as defendant took of its own of like character. (*Whitney v. The First National Bank of Brattleboro*, 55 Vt., 154.)
- 22 (Tex., 1895). A bank is liable to a special depositor for the loss of his deposit through its diversion by the bank's officers. (*El Paso National Bank v. Fuchs*, Tex. Civ. App., 34 S. W., 203.)

## AUTHORITY OF OFFICERS TO BIND BANK.

- 1 (Ga. Sup., 1877). A national bank which habitually receives special deposits for safe-keeping as matter of accommodation is bound by the act of its cashier in receiving on special deposit a package of stocks and bonds. The bank, though acting without reward, becomes a bailee and is responsible for gross negligence. (*The Chattahoochee National Bank v. Schley*, 58 Georgia, 369; 1 N. B. C., 379.)



## DEPOSITS—Continued.

## AUTHORITY OF OFFICERS TO BIND BANK—continued.

- 2 (N. Y. Appls., 1875). A cashier or other executive officer of a national bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping. Quære as to the power of a national bank to become a bailee of property either gratuitously or for hire. (First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y., 278; 1 N. B. C., 728.)
- 3 (N. Y. Appls., 1875). In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declarations and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank. (Ib.)

## MISCELLANEOUS.

*Withdrawal of special deposit, authority for.*

- 1 (Ga. Sup., 1877). If a person withdraws from a bank a special deposit, in pursuance of authority conferred upon him by the depositor, the bank is discharged, though at the time its officers were not aware of his authority. (Chattahoochee Nat. Bank v. Schley, 58 Ga., 369; 1 N. B. C., 379.)
- 2 (Ga. Sup., 1877). Written authority indorsed on a certificate of deposit of stocks and bonds to pay a certain person dividends or coupons is no authority for surrendering the stocks and bonds themselves. (Ib.)

*Conversion of special deposit, measure of damages.*

- 3 (Mo. Sup., 1870). In an action of trover against a bank, after its reorganization as a national bank, for the value of certain special deposits in coin made prior thereto, *Held*, that the measure of damage was the value of the coin at the date of its conversion, with interest thereon. (Coffey v. The National Bank of Missouri, 46 Mo., 140; 1 N. B. C., 644.)
- 4 (Pa. Sup., 1879). It seems when the president of a bank, for his own private purposes, hypothecates bonds especially deposited with the bank for gratuitous safe-keeping, and they are thereby lost, the bank is not liable, unless the bank officers knew, and assented, or used no effort to recover them. (First Nat. Bank of Allentown v. Rex, 89 Penn. St., 308; 2 N. B. C., 373.)

*When bank must deliver on demand.*

- 5 (Iowa). And where an association receives United States bonds of one class for the purpose of having them converted into bonds of another class, it is not a mere mandatary, but is responsible for the failure to deliver the bonds on demand. (Leach v. Hale, 31 Iowa, 69.)

*When special deposit not a payment to bank.*

- 6 (U. S. C. C., 1888). An insolvent was cashier of a bank to which he was largely indebted, and put certain of his own securities in a package, and placed it with similar bundles left with the bank as special deposits for safe-keeping. It was insolvent's intention in this manner to pay certain drafts securing his indebtedness to the bank, and these drafts were entered on the books as paid, and the item of bonds of the bank was increased to the extent of the value of these securities. The securities were not indorsed by insolvent, and the other officers of the bank had no knowledge of the transactions. *Held*, that no property in the securities was transferred to the bank. (Witters v. Sowles et al., 33 Fed. Rep., 542.)

*What constitutes an equitable assignment.*

- 7 (U. S. C. C., 1893). To constitute an equitable assignment of property there must be an appropriation or separation, and the mere intent to appropriate is not sufficient. (Putnam Savings Bank v. Beal, 54 Fed. Rep., 577.)

## DEPOSITS—Continued.

## MISCELLANEOUS—continued.

8 (U. S. C. C., 1893). Plaintiff bought of a bank \$25,000 of five-year city of Duluth bonds and paid the \$25,000. The bank, not having in its possession enough of the five-year bonds, proposed to set aside \$17,000 five-year bonds and \$8,000 one-year bonds, and to exchange the latter for five-year bonds as soon as received. A clerk was directed to make a package of such bonds, and mark it with plaintiff's name, and set it aside as his property, and the officers of the bank supposed this had been done. When defendant, as receiver, took possession of the bank, there were found two packages of bonds. The first package contained \$18,500 five-year bonds, with a slip of paper on which was written a memorandum, "Property of Putnam Ct. Sav. Bank; \$6,500 more due them five-year bonds." The second package contained bonds amounting to \$23,611.50, of which three, amounting to \$10,255.90, had one year to run; six, amounting to \$2,280.81, had five years to run; the remaining bonds running two, three, and four years. With this package was a slip of paper on which was written a memorandum of the date, amount of bonds, and the time when due, and also the words, "6,500 due Putnam." *Held*, that these facts did not show an equitable assignment by the bank to the plaintiff of the remaining \$6,500 worth of bonds. (Ib.)

9 (Colo., 1896). An order to a bank to pay to persons named a specified sum, out of a special fund, belonging to the drawer, in the hands of such bank, constitutes an assignment of such fund to the persons named in the order, to the amount specified, whether the bank accepts the order or not. (*Central National Bank of Pueblo v. Spratlen*, Colo. App., 43 P., 1048; 7 Colo. App., 430.)

*Officer's suit against receiver for special deposit.*

10 (U. S. C. C. A., 1892). A national bank president, against whom an indictment was pending for violating the banking laws, brought a bill against the receiver of the bank to obtain possession of a trunk alleged to contain private papers. To this proceeding the United States district attorney was made a party defendant on his own petition, for the purpose of claiming the papers, in order that they might be laid before the grand jury. After hearing, a decree was made appointing a special master to make a private examination of the trunk, with directions to turn over to the complainant any papers belonging to him, and to the receiver such papers as belonged to the bank and were not material to the prosecution against the president, and to reserve for further consideration such as concerned bank transactions and were material to the prosecution. *Held*, that in so far as the decree directed papers to be turned over to the president and the receiver, it was final and appealable, since such papers might thus pass entirely beyond control of the other party claiming them. (*Potter v. Beal et al.*, 50 Fed. Rep., 860.)

11 (U. S. C. C. A., 1892). It was improper to make the district attorney a party defendant for the purpose of procuring the papers to be laid before the grand jury. The proper course was for him to obtain a subpoena duces tecum from the court in which the investigation was pending, and then to make summary application to the court which had impounded the papers. (Ib.)

12 (U. S. C. C. A., 1892). Under the circumstances the order made by the court for an examination of the papers by a special master was in violation of the fundamental and constitutional rights of the litigants as to the method of trial. (Ib.)

13 (U. S. C. C. A., 1892). It appearing that before the bill was brought the trunk had been opened by consent of the president of the bank and the receiver and certain papers taken out in the presence of third persons, one of whom thereby obtained some knowledge of its contents, it was in the power of the court to ascertain by private examination the nature of the evidence thus to be had, and if it proved prima facie admissible, to allow public testimony thereof to be given. (Ib.)

## DEPOSITS—Continued.

## MISCELLANEOUS—continued.

*Liability when special deposit is transferred to branch bank.*

- 14 (Tex., 1896). Where the president of a bank transfers a special deposit to a branch bank without authority of the depositor there is no implied promise by such president to pay the depositor the value of it in case it is lost by failure of such branch bank. (*El Paso National Bank v. Fuchs*, Tex. Sup., 34 S. W., 206; 89 Tex., 197.)

*Liability for deception of depositor of special deposit.*

- 15 (Pa., 1880). Plaintiff, who was a depositor in a national bank, requested a certificate of deposit drawing interest for a portion of his deposit. The teller of the bank gave him a certificate which purported to be issued by B. & Co., a private banking firm, and informed him in the presence of the cashier of the bank that this was the bank's certificate, upon which assurance plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. *Held*, that the bank was liable to the plaintiff for the amount of his deposit. (*Steckel v. First National Bank of Allentown*, 93 Penn. St., 376; 3 N. B. C., 719.)

*Mistake in duplicate receipt for special deposit.*

- 16 (U. S. C. C. A., 1897). A bank, on receiving certain notes as a special deposit, issued a certificate for the amount thereof, made out on a printed form, from which the words "in current funds" were erased and "in certain notes" substituted. The certificate was marked "Special deposit." Having been transferred, this certificate was sent by the holder to the bank for payment. The notes had not then been collected, and the teller was directed by the cashier to return the certificate; but as the signature was torn, he was instructed to prepare and transmit a duplicate certificate. In doing so he carelessly omitted to change the printed form by erasing "in current funds" and substituting "in certain notes." *Held*, that there was no ground for a claim that the second certificate was given in payment for the first; that it was only a substitute for it, and that the receiver of the bank was only required to surrender to the holder the notes constituting the special deposit, for which the original was issued. (74 Fed. Rep., 1000, affirmed. *Niblack v. Cosler*, 80 Fed. Rep., 596.)
- 17 (U. S. C. C. A., 1897). Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, *Held*, to be imputable to the bank, where the other member of the firm was its president, and, as such, acted as the sole representative of the bank in accepting the certificate. (74 Fed. Rep., 1000, affirmed. *Ib.*)

*Deposit for payment on condition, recall.*

- 18 (Cal., 1901). Where a depositor delivered his certificate to the bank, indorsed to the sheriff, with directions to pay him the money whenever he should deliver to the bank for deposit a certificate of redemption of certain lands, and the sheriff never complied with the condition or made any claim to the money or certificate, the depositor may recall his deposit, and payment of the money to him by the bank discharges it from all liability. (*McGorray v. Stockton Savings and Loan Soc. et al.*, 63 Pac. Rep., 479; 3 Banking Cases, 335; 131 Cal., 321.)
- 19 (Mont., 1901). Plaintiffs agreed to sell a mine for M., and the deeds were placed in escrow in defendant bank until payment of \$47,000 as a balance of the purchase price. M. sold the mine to Scottish purchasers, and the seventh paragraph of the contract provided that the \$20,000 should be deposited with the defendant bank to pay plaintiffs the balance of the purchase price in full and other charges against

## DEPOSITS—Continued.

## MISCELLANEOUS—continued.

the mine, and that the amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called to the seventh paragraph. Plaintiffs, without knowledge of such contract, agreed to deliver the deed on receipt of \$22,000 in cash out of the first payment by the foreign purchasers, and to accept M.'s note for the balance until the second payment. Defendant, without informing plaintiffs of the provisions of the contract between M. and the foreign purchasers, paid plaintiffs \$22,000. The foreign purchasers never made any further payments. *Held*, that plaintiffs were not entitled to recover the balance of the purchase price from defendant as money had and received. (*McDonald v. American Nat. Bank; Cooney v. Same*, 65 Pac. Rep., 896; 3 Banking Cases, 616; 25 Mon., 456.)

## ACTIONS BY DEPOSITORS.

## IN GENERAL.

*Action on special deposit, memorandum.*

- 1 (Ill.). An instrument headed by the name of a bank and a list of its officers, reciting that plaintiff had left a sum of money to be loaned for his use, "payable not to exceed six months, on return of this memorandum," and signed with the name of the person represented at the top of the paper to be the cashier, the signature being followed by a scroll composed of the letters "chr.," shows prima facie a cause of action against the bank for a return of the money loaned. (*Squires v. First National Bank*, 59 Ill. App., 134.)

*When depositor's action barred, ratification.*

- 2 (Wis., 1892). An action ex contractu brought by an administrator to recover money claimed to have been wrongfully paid to defendant by a bank constitutes an election and ratification of the payment and precludes a subsequent action against the bank on the same claim. (*Crook v. First National Bank of Baraboo*, 52 N. W., 1131; 83 Wis., 31.)

*Action by assignee of certificate of deposit, evidence.*

- 3 (Utah, 1894). In an action to recover on certificates of deposit alleged to have been assigned plaintiff by deceased, where the complainant alleges and the assignment recites a consideration of \$1,000, and the assignment is attacked as fraudulent, testimony that deceased said she intended plaintiff to have all her property when she died is incompetent. (*Turner v. Utah Title Insurance & Trust Co.*, Utah, 37 P., 91; *Same v. Wells, Fargo, & Co.*, ib., 94; *Same v. Union National Bank*, ib., 95; 10 Utah, 61.)

*Action for special deposit, parties.*

- 4 (Cal., 1894). In an action to recover money deposited by plaintiff with defendant under an agreement that it is to be paid to a third person on condition that the latter deliver a deed to plaintiff within a certain time, such person is not a necessary party. (*Ulrich v. Santa Rosa National Bank*, Cal., 37 P., 500; 103 Cal., XVIII.)

*Conflicting claims of depositors, interpleader.*

- 5 (U. S. C. C., 1880). When conflicting claims are filed by different persons against a national bank for a deposit, the bank may compel them to interplead and settle the controversy between themselves. (*Foss v. First Nat. Bank of Denver*, 3 Fed. Rep., 185.)

*Tender of receipt or check not condition precedent to a cause of action.*

- 6 (Iowa, 1901). In an action to recover money deposited in defendant bank to plaintiff's credit, and which he had not received because of mistake in settlement, the tender of a receipt or check is not a condition precedent to a cause of action. (*Cole v. Charles City Nat. Bank*, 87 N. W. Rep., 671; 4 Banking Cases, 5; 114 Iowa, 632.)

## DEPOSITS—Continued.

## LIMITATIONS UPON ACTIONS FOR DEPOSITS.

- 1 (U. S. C. C., 1886). A certificate of deposit, payable to the order of the depositor on the return of the certificate, is not due or suable until demand made and return of the certificate. The statute of limitations is not set in motion against a certificate of deposit by the appointment of a receiver for the bank which issued it. (*Riddle v. First National Bank of Butler*, Pa., 27 Fed. Rep., 503.)
- 2 (Cal., 1884). In an action brought to recover money deposited in any bank there is in this State no limitation. (*Green v. Odd Fellows' Savings and Commercial Bank*, 65 Cal., 71.)
- 3 (Ill., 1888). Entry in a pass book is evidence of indebtedness in writing, and a suit is not barred until ten years after the cause of action accrued. (*Schalucky v. Field*, 124 Ill., 617.)
- 4 (Iowa, 1900). A demand certificate of deposit, in the usual form, is in effect a promissory note, and the statute of limitations commences to run at its date. The statute of limitations running against a certificate of deposit is not interrupted by the death of the depositor. The fact that the bank writes to the depositor denying liability will not toll the statute of limitations running against his certificate of deposit, where evidence of the bank's liability exists in the bank books. (*Mereness v. First National Bank of Charles City*, 2 Banking Cases, 623; see note at end of case; 112 Iowa, 11.)
- 5 (Md., 1838). The statute of limitations begins to run upon deposits from the date the depositor learns of the bank's suspension. (*Union Bank v. Planters' Bank*, 9 Gill & J., 439.)
- 6 (N. H.). The statute begins to run from the date of the deposit. (*Locke v. First National Bank*, 65 N. H., 670.)
- 7 (N. Mex., 1901). A certificate of deposit, like a deposit credited in a pass book, represents money actually left with the bank for safe keeping. It is to be retained by the bank until demanded by the depositor, and the statute of limitations does not begin to run against it until presentation and demand of payment. (*Bank of Commerce v. Harrison*, 66 Pac. Rep., 460.)
8. The statute of limitations begins to run upon deposits, whether payable on demand or not, from the date of the demand.  
(Md.) *Falls Point Saving Institution v. Weedon*, 18 Md., 320;  
(N. Y.) *Howell v. Adams*, 68 N. Y., 314.
- 9 (N. Y. App., 1886). Whenever a demand for a deposit is made by check or otherwise, the statute of limitations begins to run as against the amount demanded. (*Viets v. Union National Bank of Troy*, 101 N. Y., 563.)
- 10 (Pa. Sup. Ct., 1884). A certificate of deposit payable to the order of the depositor on the return of the certificate is not due until demand is made, and until that time the statute will not begin to run. (*McGough et al. v. Jamison*, 107 Pa., 336.)
- 11 (Pa., 1892). A bank delivered a statement of account to a depositor. After acquiescing in the correctness of the account for six years, the depositor claimed the account to have been wrongly stated. *Held*, that he was barred by the statute. (*In re Penn Bank*, 152 Pa., 65.)

## DEPUTY COMPTROLLER.

- 1 (U. S. Sup. Ct., 1890). A certificate signed by the Deputy Comptroller of the Currency as "Acting Comptroller of the Currency" is a sufficient certificate by the Comptroller of the Currency within the requirements of Revised Statutes, par. 5154. (*Keyser v. Hitz*, 133 U. S., 138.)
- 2 (U. S. C. C., 1891). The Deputy Comptroller of the Currency being authorized by law to act for the Comptroller in certain contingencies, the courts will presume, in the absence of any showing to the contrary, that the Deputy, in acting for the Comptroller in any particular instance, has acted lawfully. (*Young v. Wemp et al.*, 46 Fed. Rep., 354.)

DIRECTORS. (*See OFFICERS.*)

## DISTRICT ATTORNEY.

- 1 (U. S. Sup. Ct., 1869). The fifty-sixth (now one hundred and fifty-third) section of the act providing that suits under it in which officers of the United States are parties shall be conducted by the district attorney of the district is directory only, and can not be set up by stockholders to defeat a suit brought against them by a receiver, under the act, which receiver, with the approval of the Treasury Department, and after the matter had been submitted to the Solicitor of the Treasury, had employed private counsel, by whom alone suit was conducted. (Kennedy v. Gibson, 8 Wall., 498.)
- 2 (U. S. Sup. Ct., 1893). District attorney can not recover compensation for services in conducting suit arising out of the provisions of the national banking law in which the United States or any of its agents or officers are parties. (Gibson v. Peters, Receiver, 150 U. S., 342.)
- 3 (U. S. Sup. Ct., 1893). The expenses of a receivership can not be held to include compensation of district attorney for conducting a suit in which the receiver is party, and he can not receive any compensation for services so rendered or offered to be rendered. (Ib.)
- 4 (U. S. C. C., 1891). For services performed by the district attorney in bringing a suit against a national bank and obtaining a forfeiture of its charter, he is not entitled to more than \$10, the fees prescribed by section 824, there being no other law in the United States giving a compensation to a district attorney for such services. (Bashaw v. United States, 47 Fed. Rep., 40.)

*District attorney, when conducts actions.*

- 5 (U. S. Sup. Ct., 1871). Suits and proceedings under the act in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the district attorney, under the direction of the Solicitor of the Treasury, and from appointment of receiver directors' authority ceases. (First National Bank of Bethel v. National Pahquioque Bank, 14 Wall., 383.)

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DRAFTS. (*See CHECKS.*)ENFORCEMENT OF PAYMENT OF CAPITAL STOCK. (*See CAPITAL STOCK.*)

ESTOPPEL.

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*Who estopped to deny incorporation of bank.*

1. A shareholder who has held himself out to the world as such is estopped to deny that the association was legally incorporated.  
(U. S. Sup. Ct., 1876) *Casey v. Galli*, 94 U. S., 673;  
(Ill.) *Wheelock v. Kost*, 77 Ill., 296.
- 2 (U. S. Sup. Ct., 1876). A shareholder against whom suit is brought to recover the assessment made upon him by the Comptroller will not be permitted to deny the existence of the association, or that it was legally incorporated. (*Casey v. Galli*, 94 U. S., 673.)
- 3 (Ala.). A stockholder of a private corporation, when sued by its creditors, is estopped from denying the legal existence of the corporation, or insisting that its charter has been forfeited by noncompliance with statutory provisions for which a forfeiture might be judicially declared. (*National Commercial Bank v. McDonnell*, 92 Ala., 387.)
- 4 (Ind.). After a party has recovered judgment against a corporation, as such, and obtained the appointment of a receiver therefor, he can not in the same suit deny its corporate entity and seek to hold the stockholders thereof liable as partners. (*First National Bank of Crawfordsville v. Dovetail Body & Gear Co.* (Ind. Sup.), 42 N. E., 924; 143 Ind., 534.)
- 5 (Ky., 1870). The organization of a national bank under the national banking act may be put in issue by a party who has not estopped himself. But a party who has accepted as payee a promissory note payable at a banking institution which the parties to the note style a national bank, and has sold and transferred the note to such banking institution, can not be allowed to raise that issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate, etc. (*Huffaker v. National Bank of Monticello*, 12 Bush, 287; 1 N. E. C., 504.)
- 6 (N. Y.). Where one sued by a national bank is accustomed to deal with it as such and does so deal with it in respect to the matter in suit, he is estopped from denying its incorporation. (*National Bank of Fairhaven v. The Phoenix Warehousing Company*, 6 Hun., 71.)

*When director not estopped.*

- 7 (Mo., 1900). Bank directors, in an action against them under section 2760, Revised Statutes, 1889, of Missouri, are not estopped to plead ignorance of its conditions. (*Utley v. Hill et al.*, 2 Banking Cases, 371.)
- 8 (Ohio). A director is not, by reason of his position, estopped from setting up the defense of usury in an action brought against him by the association. (*Bank of Cadiz v. Slemons*, 34 Ohio St., 142.)

## ESTOPPEL—Continued.

*When bank estopped by act of its officers.*

- 9 (U. S. C. C., 1893). An officer of a bank borrowed money for his individual benefit, but in the name of the bank and upon a false certificate of deposit and collateral belonging to the bank. *Held*, that his bank was estopped to deny the loan and is liable therefor, as the lender dealt with him solely in his official capacity. (*Stewart v. Armstrong*, 56 Fed. Rep., 167.) •
- 10 (U. S. C. C., 1893). Vice-president of bank, also manager of a commercial house, substituted as collateral notes to order of his house, and indorsed by them without consideration. *Held*, that, as against holders of collateral, the house was estopped to deny that these notes were properly pledged as security for a loan to his bank. (Ib.)
- 11 (U. S. C. C., 1893). The estoppel upon his bank exists only in favor of lender. Hence, his house has no remedy against his bank for any liability enforced by the lender on account of its indorsed notes so pledged. (Ib.)
- 12 (U. S. C. C. A., 1897). The cashier of a bank does not act as its agent or representative in answering an inquiry addressed to him by another bank as to the business standing of a third person; and the bank is not bound or estopped by statements so made by him, his act being one not relating to the business of his bank, but simply one of customary courtesy rendered without consideration. (First National Bank of Manistee, Mich., et al. v. Marshal and Ilsley Bank of Milwaukee, Wis., 83 Fed. Rep., 725.)
- 13 (U. S. C. C. A., 1897). The failure of the officers of a bank, in answering a general inquiry from another bank as to the character and standing of a customer, to disclose the fact that the customer was indebted to their bank, and that it held liens on certain of his property, will not estop it, to assert such liens as against a mortgage subsequently taken by the inquiring bank, in the absence of any fraudulent intent. (Ib.)
- 14 (Ky. App., 1887). Where the cashier of a bank purchases bonds without authority of the bank, afterwards appropriates them to his own use, it is estopped to deny the authority of the cashier. (*Logan County Nat. Bank v. Townsend*, 3 N. B. C., 448.)
- 15 (Mich., 1895). Where the cashier, intrusted by its directors with its entire management, has been accustomed in having paper rediscounted to guarantee its payment, the bank will be estopped from denying his authority to so guarantee it. (First National Bank of Kalamazoo v. Stone, Mich., 64 N. W., 487; 106 Mich., 367.)
- 16 (N. H.). If, upon inquiry by the surety, the cashier, knowing that he is a surety, inform him that the note is paid, intending that he should rely upon his statement, and the surety does so, and in consequence changes his position by giving up securities, or indorsing other notes for the principal, or the like, the bank will be estopped to deny that such note is paid. (*Cochecho National Bank v. Haskell et al.*, 51 N. H., 116.)
- 17 (Utah, 1897). Where the manager of a bank, with the knowledge of its directors and without objection, continually exercises the authority to discharge guarantors of notes and accept collaterals in lieu thereof, the bank is estopped, after third persons have in good faith acted on such appearances, to deny his authority. (*Armstrong v. Cache Valley Land and Canal Co.*, 48 Pac. Rep., 690; 14 Utah, 450.)

*When ratification amounts to an estoppel.*

- 18 (Nebr., 1896). In order to constitute a ratification of an unauthorized act, the act relied on as such ratification must be performed with knowledge of the material facts in the absence of circumstances creating an equitable estoppel. (*Columbia National Bank of Lincoln v. Rice*, Nebr., 67 N. W., 165; 48 Nebr., 428.)

*Estoppel by representations to obtain credit.*

- 19 (Mich., 1895). A bank which received a letter from another bank, asking in regard to the character and financial standing of a certain person,



## ESTOPPEL—Continued.

without any intimation as to the making of a loan, is not estopped, as against a loan subsequently made by the inquiring bank, to claim a chattel-mortgage lien on the man's property, because in its answer it merely stated the man's character and assets above his indebtedness, without stating that he was indebted to it. (*First National Bank of Manistee v. Marshall & Ilsley Bank, Mich.*, 65 N. W., 604; 108 Mich., 114.)

- 20 (Mich., 1895). Statements of a mortgagor, made for the purpose of obtaining credit for a corporation of which he was a member, that he had sold to it the mortgaged property, would not conclude the mortgagee unless it had knowledge thereof at the time and kept silent. (Ib.)
- 21 (Tex. Civ. Appls., 1892). A partner who is made known by his fellow-partner to a third person, in order to obtain credit, can not afterwards claim to be a dormant partner as to such person, so as to relieve him from the necessity of giving notice upon retiring from the partnership. (*Milmo National Bank v. Bergstrom*, 20 S. W., 836; 1 Tex. Civ. App., 151.)

*Estoppel in favor of innocent purchaser.*

- 22 (Ala., 1894). The maker of a note payable at Tuscaloosa Fence Factory is estopped in a suit thereon by an innocent purchaser for value to deny the existence of such a place. (*Brown v. First National Bank of Tuscaloosa*, 15 So. Rep., 435; 103 Ala., 123.)
- 23 (S. Dak., 1902). One who has been defrauded out of a certificate of deposit by a gambler is not estopped from denying the title of the indorsee of such gambler (the indorsee not being a bona fide purchaser) by the fact that he was present when the transfer was made and made no objections; his presence being merely an incident to the scheme to defraud. (*Dunn v. Nat. Bank of Canton*, 4 Banking Cases, 522.)
- 24 (Tex., 1896). The holder of part of the bonds of an insolvent corporation is not estopped to set up the invalidity or want of consideration of other of the bonds not in the hands of innocent holders. (*Farmers & Merchants' National Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.), 36 S. W., 131; *Metropolitan Trust Co. v. Farmers & Merchants' National Bank*, ib.)

*When wife estopped to plead her suretyship.*

- 25 (N. J., 1893). A wife, jointly with another person, signed a note to her husband's order, and delivered it to him to have discounted, and with the proceeds pay a debt of his. The husband applied to a bank official, who had notice that the note was made without consideration, but did not have notice that the proceeds were to be applied for the husband's benefit, and the official offered to discount it by a check to the wife's order, which the husband accepted, and afterwards procured his wife to indorse and deliver to him, she knowing that it was the proceeds of her note. *Held*, that the wife was estopped from setting up against the bank that she was a mere surety on the note. (*Hackettstown National Bank v. Ming* (N. J. Ch.), 27 A., 920; 52 N. J. Eq., 156.)
- 26 (N. J., 1893). A bank recovered judgment at law by default on a note made by a wife to the order of her husband, and subsequently the wife obtained an order opening the judgment, with unrestricted leave to plead. She pleaded that she occupied the position of surety on the note and was a married woman, and also that it was a contract made with her husband and therefore void at law. The bank then filed a bill in equity for an injunction against setting up these defenses at law. On the trial of the issues thus raised the defense of suretyship was not sustained. *Held*, that the bank was in effect compelled to come into equity by defendant pleading that the contract was between husband and wife, and that, having established its case there on the merits, defendant should not be permitted to litigate it again in the law courts. (Ib.)

## ESTOPPEL—Continued.

*Estoppel by silence and delay.*

- 27 (U. S. Sup. Ct., 1899). Less than two years having elapsed from the payment of the first dividend to the filing of this bill, and the other creditors of the bank not having been harmed by the delay, no presumption of laches is raised, nor can an estoppel properly be held to have arisen. (*Merrill v. National Bank of Jacksonville*, 173 U. S., 131.)
- 28 (U. S. C. C. A., 1900). Plaintiff sued the receiver of a national bank for money loaned the bank, for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively that plaintiff contracted for the loan with the bank cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not receipted for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the Comptroller and to defendant, written after the bank's insolvency, plaintiff, who was inexperienced in business matters, referred to herself as a stockholder. *Held*, that the evidence did not estop plaintiff from showing that she was not a stockholder, and that that issue was properly submitted to the jury. (*American Nat. Bank v. Williams*, 101 Fed. Rep., 943.)
- 29 (Tex., 1898). Defendant bank, upon being instructed by the cashier of plaintiff bank, applied the latter's deposit to the payment of the private debt of the cashier, and transmitted him the note and collateral therefor. Plaintiff did not learn of this for several months, at which time the cashier, who was not then connected with plaintiff, was hopelessly insolvent, and the collateral, even if he still had it, was worthless. *Held*, that plaintiff was not estopped by failure to repudiate the action of the cashier after discovering it. (*Iron City Nat. Bank v. Fifth Nat. Bank*, 47 S. W. Rep., 533; 92 Tex., 436.)

*When receiver not estopped to question jurisdiction.*

- 30 (U. S. C. C., 1873). An action having been commenced in a State court against an insolvent national bank, the receiver of the bank appointed, by the Comptroller of the Currency was on his own application substituted as defendant. *Held*, that the receiver was not thereby estopped from questioning the jurisdiction of the court. (*Cadle v. Tracy*, 1 N. B. C., 230; 11 Blatchford, 101.)

*When fraudulent statements do not estop.*

31. Fraudulent statements must be relied upon before they may be pleaded in estoppel.  
 (U. S. C. C. A., 1901) *Modern Woodmen of America v. Union National Bank of Omaha*, 108 Fed. Rep., 753;  
 (Tex., 1901) *Waxahachie National Bank v. Beilharz*, 62 S. W., 743; 94 Tex., 493.

*Cases in which the facts held not to be an estoppel.*

- 32 (U. S. C. C., 1897). A national bank which returns its capital for taxation is not thereby estopped from setting up that the same was not subject to taxation, and refusing to pay the tax. (*Brown v. French*, 80 Fed. Rep., 166.)
- 33 (U. S. C. C., 1897). The judgment in an action is conclusive in a subsequent action between the same parties upon the same cause as to all questions which might have been presented and determined in the first suit; but in a subsequent action between the same parties upon a different cause it is conclusive only upon such questions as were actually litigated and determined in the first suit. (*Lawrence v. Stearns*, *Stearns v. Lawrence*, 79 Fed. Rep., 878.)

ESTOPPEL—Continued.

- 34 (U. S. C. C., 1897). One who has been prosecuted to judgment upon a cause of action based on the negligent act of another, who has been called in to defend and has defended the suit, may sue such other party for indemnity, and rest his case upon the former adjudication, it being shown that it was in consequence of such negligence that the former judgment passed. (Ib.)
- 35 (Ky., 1901). Where a bank returned to its correspondent several notes, notifying it that they had been charged to its account for its failure to protest them for nonpayment when they were in its hands for collection, the fact that it retained the notes, and thus admitted its liability, does not estop it from denying that it is liable and claiming that it admitted its liability under mistake of law, as the other bank, though misled, has not been induced thereby to change its condition for the worse, the notes not being on the footing of bills of exchange. (Louisville Banking Company v. Asher, 65 S. W. Rep., 831; 4 Banking Cases, 407.)
- 36 (Md., 1901). Where plaintiff, who was entitled to a deposit in the joint names of herself and her husband by right of survivorship, indorsed the certificate to her husband's administrator on his representation that it belonged to the estate, and in ignorance of her rights, and there was no evidence that she intended to transfer it to the administrator, the indorsement did not preclude her from maintaining an action for the deposit. (Brewer v. Bowersox, 48 Atl. Rep., 1060; 4 Banking Cases, 90; 92 Md., 567.)
- 37 (Tex., 1894). One who has demanded a certain amount as a balance due on a trade is not estopped from suing for a greater amount, and may explain the demand. (First National Bank of Arlington v. Lynch (Tex. Civ. App.), 25 S. W., 1042.)
- 38 (Vt.). The fact that the bank stamped the original note "Paid" instead of "Renewed," in the belief that the forged signature of the surety on the renewal note was genuine, does not estop it from enforcing its claim against the surety on the original note, though the surety, seeing the latter in the hands of the principal, believed it had been paid, and signed other notes of the principal as surety to his damage. (Lyndonville National Bank v. Fletcher, 34 A., 38; 68 Vt., 81.)

*Estoppel of bank.*

- 39 (Nebr., 1899). A national bank by consenting to the order appointing a receiver, which did not determine the terms or conditions or time of the sale, is not estopped from resisting a subsequent order of sale by the receiver. (State ex rel. German Savings Bank v. Fawcett, 78 N. W. Rep., 636; 58 Nebr., 371.)

EVIDENCE.

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## BANK BOOKS AS EVIDENCE.

- 1 (U. S. C. C. A., 1896). When the books of a bank are offered in evidence by one party to a suit, the other party is entitled to avail himself of any part of the evidence contained therein, such as the state of a particular account. (*Blanchard v. Commercial Bank of Tacoma*, 75 Fed. Rep., 249.)
- 2 (U. S. C. C. A., 1896). In an action to recover a sum alleged to have been loaned to a bank, the receiver thereof claimed that the loan was to the president of the bank personally. He also contended that the bank's books should not be considered as evidence that the loan was to the bank, because they were not properly kept, and he offered to show by expert testimony what would have been the proper method of entering the transaction if the loan had been made to the bank. *Held*, that this evidence was properly excluded, as it did not appear that there was any such ambiguity in the account as to require expert evidence in relation thereto. (*Ib.*)
- 3 (U. S. C. C. A., 1899). In a suit between the receiver of a national bank and a stockholder the books of the bank are evidence to establish acts of the corporation and its financial condition at a particular time, though not as to dealings between the corporation and the defendant. (*Hayden v. Williams*, 96 Fed. Rep., 279.)
- 4 (U. S. C. C. A., 1899). In prosecutions for making false reports to the Comptroller of the condition of a national bank the books of the bank, having been properly identified as such, were admissible against defendant without it being shown that they had been correctly kept, as the presumption is in favor of their correctness. (*Bacon v. United States*, 2 Banking Cases, 26; 97 Fed. Rep., 35.)
- 5 (Ala., 1893). In an action by a bank on a note dated on Sunday its "discount register" is not admissible in evidence to show that the note in suit was a renewal of a note which matured on Sunday, and that the renewal note was made on a certain week day after its date and dated back to the date of the maturity of the first note, according to the custom of the bank. (*Hauerwas v. Goodloe*, 13 So. Rep., 567; 101 Ala., 162.)
- 6 (Colo., 1898). The relation of defendants, as stockholders of the bank, was sufficiently shown by entries in the "stock book," and by the testimony of a witness to the effect that such book represented the stockholders and was the only book kept for the purpose; that it was kept in the ordinary course of business, while he was connected with the bank; that he made some of the entries himself, and that the persons named therein took part in the meetings of stockholders during the period of time their names appeared on the book. (*Zang et al. v. Wyant et al.*, 1 Banking Cases, 349; 25 Colo., 551.)
- 7 (Colo., 1898). The claims sued upon consisted of money deposited with the bank, time and demand certificates of deposit, and drafts that

## EVIDENCE—Continued.

## BANK BOOKS AS EVIDENCE—continued.

had been issued by the bank and protested for nonpayment; and the "daily balance book" and the "draft book," identified by a witness, who had been the bank's cashier during the period in question, were admitted to prove such claims. *Held*, that the books were admissible for such purpose in an action against the stockholders, section 4817. Mills's Ann. St., enabling a party to use his own books as evidence in his own behalf, not being applicable. (Ib.)

- 8 (Colo., 1898). Pass books were issued by the bank to each of its depositors, in which the amount of their deposits were entered by the receiving teller at the time they were made. A deposit slip, showing the amount of his deposit, was made out by the depositor, and the deposit slips were preserved by the bank, and from them the entries in the balance book were made. *Held*, that the entries in pass books furnished no better evidence of the amounts deposited than the entries in the balance book. (Ib.)
- 9 (Iowa, 1900). In a suit in equity to impress a trust on funds in the hands of defendants, as assignees of a bank, a witness who had been the bank's bookkeeper, and was one of its assignees, was properly allowed to make statements from the bank's books as to the condition of its assets at certain periods, the books being in court and plaintiff having had ample opportunity to examine them and to cross-examine the witness. (Bradley v. Chesebrough et al., 2 Banking Cases, 409; 111 Iowa, 126.)
- 10 (Iowa, 1900). In such an action, in order for plaintiff to prevail, it is not enough that it appears that the trust money was deposited in and received as such by the bank and wrongfully converted by it, but it must appear by presumption of law or otherwise that it has been preserved in the hands of the assignees as an increase of assets which may be taken without impairment to the rights of creditors. (Ib.)
- 11 (Mich., 1901). Where a fund is deposited in a bank in the name of a certain depositor, it shows a prima facie title in the depositor, and a claimant thereof in an interpleader's suit must show a clear title thereto. (Detroit Sav. Bank v. Haines et al., 87 N. W. Rep., 66; 3 Banking Cases, 648; 128 Mich., 38.)
- 12 (Minn., 1901). When books of account which are material to an issue on trial are properly received in evidence, and, being in court, open to inspection by all parties, require a long examination of many details, it is proper to receive balances of summaries from an expert witness who has made the same upon proper foundation being laid. (State v. Clements, 3 Banking Cases, 153; 85 N. W. Rep., 229; 82 Minn., 434.)
- 13 (Mo. App., 1902). Where a depositor receives his bank book, duly balanced, together with canceled checks, and retains it an unreasonable length of time without objection, the balance therein becomes an account stated, but is nevertheless only prima facie evidence of its correctness; and the depositor is not precluded from impeaching it, as based on the payment of forged checks, unless the payment of the checks was induced by his negligence and special damage will result to the bank if compelled to make restitution. (Kenneth Inv. Co. v. National Bank of the Republic of St. Louis, 5 B. C., 13; 70 S. W. Rep., 173.)
- 14 (Mo. App., 1902). In such case, however, the burden of proof is on the depositor to show that the balance was in fact based on the payment of forged checks. (Ib.)
- 15 (N.Y., 1901). Where, in an action against the bondsmen of a bank cashier to recover for an alleged breach of the bond for failure to enter a true account and turn over the money in his custody, there was no preliminary proof of who made the original entries in the bank's books, or as to the custom of keeping them, or that the parties by whom they were kept were dead or without the jurisdiction of the court, such entries and computations therefrom by an expert who

## EVIDENCE—Continued.

## BANK BOOKS AS EVIDENCE—continued.

never saw them until after the cashier ceased his duties were not admissible in evidence. (*State Bank of Pike v. Brown et al.*, 3 Banking Cases, 148; 165 N. Y., 216.)

- 16 (S. C., 1894). Where the genuineness of the signatures of certain letters alleged to have been written by plaintiff were in question, and she admitted her signature to a certificate of stock, it was not error to send the stock book to the jury for a comparison of signatures, (*Rose v. Winnsboro National Bank*, 19 S. E., 487; 41 S. C., 191.)

*Evidence in an action against a receiver.*

- 17 (N. J. Eq., 1894). In an action against the receiver of an insolvent corporation, the facts that he represents the corporation and produces its books of account do not prevent him from contradicting the entries therein, as he represents creditors also. (*Whittaker v. Amwell National Bank*, 29 A., 203; 52 N. J. Eq., 400.)

## WRITTEN INSTRUMENTS AS EVIDENCE.

- 1 (Ala., 1895). On an issue whether a check had been raised in amount, it was error to admit in evidence a check which bore evident signs of having been altered, as a result of experiments with acids which had been made thereon, for the purpose of showing that an alteration could not be made without detection. (*Birmingham Nat. Bank v. Bradley*, 19 So. Rep., 791; 108 Ala., 205.)
- 2 (Ga., 1893). An unsigned entry on a deed is inadmissible to show the time it was filed for record. (*First National Bank v. Cody*, 19 S. E., 831; 93 Ga., 127.)
- 3 (Iowa, 1892). In an action by a bona fide holder on bonds of a school district, purporting to have been issued in satisfaction of a judgment against the district, as authorized by acts Seventeenth General Assembly, chapter 132, the defense was that such bonds had been fraudulently issued after the judgment had been already satisfied by a prior issue of bonds. *Held*, that, after a showing that a diligent search had been ineffectually made for the records of the district authorizing the first issue of bonds, and after the then secretary of the district identified one of such bonds as having been issued in payment of the judgment in question, and had partly described the others, such bonds purporting on their face to have been issued by the officers of the district, and having been afterwards found to be valid obligations of the district by a court of competent jurisdiction, were themselves properly admitted in evidence. (*First National Bank v. District Tp. of Doon*, 53 N. W., 301; 86 Iowa, 330.)

*When position of indorsers' names not evidence.*

- 4 (Minn., 1892). Where the cashier of a bank who assumed to be acting as such applied to another bank in the usual course of business to discount a note produced by him, payable to himself, and regularly indorsed by him in both his individual and official capacity, neither the fact that he appeared to be the payee and first indorser and his bank the second indorser, nor that the avails of the note were received by him personally, was conclusive evidence that the indorsement of his bank was unauthorized or for his own accommodation. (*Merchants' National Bank v. McNeir*, 53 N. W., 178; 51 Minn., 123.)

*Of deposits, slips, and pass books.*

- 5 (Cal., 1899). A claim showing the state of the depositor's account with the bank, signed by its manager, and delivered to the depositor in place of his bank book, after the bank's insolvency, but while it was under the control and management of its directors, was competent evidence in an action to enforce the stockholder's liability, and was not subject to objection as a mere declaration of officers after insolvency, as it was merely a restatement of what the bank book, which was in evidence, showed. (*Dingley v. McDonald et al.*, 2 Banking Cases, 153; 124 Cal., 90.)

## EVIDENCE—Continued.

## WRITTEN INSTRUMENTS AS EVIDENCE—continued.

- 6 (Cal., 1900). A pass book shown to be the handwriting of the bank's cashier, and to have been issued to him in the regular course of business, is admissible in evidence in an action by the depositor's administratrix against such bank to recover sums alleged to have been deposited. (*Nicholson v. Randall Banking Co.*, 3 Banking Cases, 26; 130 Cal., 533.)
- 7 (Idaho Sup., 1901). It is not error to allow the cashier of a bank to testify to the terms of said deposit agreement, although the person with whom it was made be dead. (*Greene v. Bank of Camas Prairie*, 64 Pac. Rep., 888; 7 Idaho, 576.)
- 8 (N. Dak., 1900). The issuance of a deposit slip by a bank or the entry of a deposit in a pass book has only the effect of a receipt for money. While it raises a presumption that the deposit was made, yet it is open to parol explanation. (*Andrews et al. v. State Bank of Wheatland*, 2 Banking Cases, 508.)

*Evidence—Account—Each side prima facie evidence of its contents.*

- 9 (U. S. C. C. A., 1904). The introduction in evidence without qualification of an account containing debit and credit items makes each side evidence of its contents. In the absence of all other evidence, the debits and credits of such an account offset each other, and the account proves its balance only. An admission must be taken with its qualifications as an entirety. But where there is other evidence the court or jury is not required to give equal credit to each side of the account, to the admissions against interest, and to the self-serving statements contained in it. They may, and they should, determine the fact for or against the evidence contained in the account as the preponderance of all the evidence in the case and the rules of law require. (*Simpson v. First Nat. Bank of Denver*, 129 F. R., 257.)

## ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN WRITING.

- 1 (U. S. C. C. A., 1896). Where the facts do not appear on the face of the judgment oral evidence is admissible to show how credits thereon came to be allowed and what they were allowed for. (*Humphreys v. Third National Bank of Cincinnati*, 75 Fed. Rep., 852.)
- 2 (Ala., 1893). In an action on a note dated on Sunday the burden is on plaintiff to show that it was in fact executed on a day which was not Sunday. (*Hauerwas v. Goodloe*, 13 So. Rep., 567; 101 Ala., 162.)
- 3 (Ala., 1893). In an action by a bank on a note dated on Sunday it is not error to admit evidence that the note is in the handwriting of the bank's cashier, and that he was not in the employ of the bank until after the date of the note, and that the note is a renewal note and dates back. (Ib.)
- 4 (Cal., 1895). In an action by one bank against another on a note, and for money loaned, where defendant asserts that plaintiff bought the note, proof of the negotiations for the loan, and that defendant received its proceeds, is not incompetent as varying the written instrument. (*First National Bank of Chicago v. California National Bank* (Cal.), 35 P., 639.)
- 5 (Mich., 1894). Parol evidence is admissible to show that the word "accounts," as used in an assignment for the purpose of security, of the "good and collectible accounts" of the assignor, covered not only such accounts as showed an unconditional liability on the part of the debtor at the date of the assignment, but also partially executed contracts and consignment contracts which called for payment in the future and on conditions to be performed. (*Preston National Bank v. The George T. Smith Middlings Purifier Co., et al.*, 60 N. W., 981; 102 Mich., 462.)
- 6 (Mo., 1902). Where a certified check given by a firm to one of its members was retained by the payee ten months, during which the account

## EVIDENCE—Continued.

## ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN WRITING—continued.

was drawn out, and, in an action on the check, the defense was fraud, it was proper to admit evidence of a conversation between plaintiff and the teller at the time of certification tending to show that it was understood that the check should be presented in a few days; such evidence not tending to vary the written contract, but being a material fact on the issue of fraud. (*Muth v. St. Louis Trust Co.*, 67 S. W. Rep., 978; 4 Banking Cases, 416; 94 Mo. App., 94.)

7. (Nebr., 1893). As against bona fide purchasers of a note signed in blank on the back thereof by a third person before delivery to the payee, parol evidence is not admissible to show that such person signed as accommodation indorser, and not as joint maker, as presumed by law. (*Salisbury v. First National Bank of Cambridge City*, 56 N. W., 727; 37 Nebr., 872.)
8. (Tex., 1895). Parol evidence is admissible to show that a note, though in the possession of the payee, was delivered with the understanding that it would not be binding upon the makers unless signed by other persons. (*Merchants' National Bank v. McAnulty* (Tex. Civ. App.), 31 S. W., 1091.)

*Of collateral security.*

9. (Va., 1901). In support of a claim by a bank that insurance policies on the life of a decedent were held by it to secure all his indebtedness to it, including that as guarantor on two notes, two of its directors, who arranged for the assignment of the policies, testified positively that it was made with that understanding; and the president who conversed with him after his proposition to assign had been accepted, said that he so understood it. To overcome this evidence, it was shown that after the assignment payments were made to the bank by him and his trustees under an assignment for creditors, and credited on the guaranteed notes; but it clearly appeared that these payments were made, not on account of his liability as guarantor, but on account of his indebtedness to the maker of the notes. *Held*, that under the evidence the bank was entitled to deduct the entire debt from the proceeds of the policies. (*First Nat. Bank of Roanoke v. Terry's Adm'r*, 3 Banking Cases, 317; 99 Va., 194.)

*Oral evidence of unrecorded proceedings of bank.*

10. (Wis., 1901). A mortgage to a bank is released, without being delivered up, where the directors of the bank pass a resolution releasing it, holding the personal security only, to enable the mortgagor to improve the property, and he does so and conveys the property, and no claim is made on the mortgage till ten years later, and then by the bank's assignee. (In re Bank of West Superior. *Goodvin v. Nichols*, 85 N. W. Rep., 501; 3 Banking Cases, 322; 109 Wis., 672.)
11. (Wis., 1901). The act of the directors of a bank in releasing a mortgage by resolution may be proved by parol, witness testifying that he did not think this action appeared on the records, and there being no evidence that it did so appear. (*Ib.*)

*Of custom of banks.*

12. (Ind., 1901). Where, in a suit on a note given by certain directors of a bank for a loan procured by the directors for their individual use, and they had no authority to cause the indorsement, evidence of the custom of the banks in that vicinity to borrow money without special authority of the board of directors was admissible. (*First Nat. Bank of Huntington v. Arnold et al.*, 60 N. E. Rep., 134; 156 Ind., 487.)

*Of admissions of bank officers.*

13. (Nebr., 1896). The testimony on another trial of an officer of a corporation with relation to previous corporate acts can not be proved as an admission binding upon the corporation. (*Columbia National Bank of Lincoln v. Rice*, 67 N. W., 165; 48 Nebr., 428.)



## EVIDENCE—Continued.

## ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN WRITING—continued.

*How testimony of witness in another case may be proven.*

- 14 (Nebr., 1894). The testimony of a witness in another case may be proven by anyone who heard it, and the reporter's notes are not the only or best evidence. (*German National Bank v. Leonard* (Nebr.), 59 N. W., 107; 40 Nebr., 676.)
- 15 (Nebr., 1894). The testimony of a witness in an action to which he was not a party may be proven in a subsequent action to which he is a party as an admission. (Ib.)

## FRAUD, MISAPPROPRIATION, NEGLIGENCE, BURDEN OF PROOF.

- 1 (U. S. C. C. A., 1899). Where it is not shown that a certain collection made by a receiver of an insolvent national bank was forwarded by a correspondent of the bank, nor included in the list of items sent, it is not sufficiently traced; and this though the receiver testified that the item was collected for the forwarding bank. (*Richardson v. Louisville Banking Co.*, 94 Fed. Rep., 442.)
- 2 (U. S. C. C. A., 1899). A bill by the receiver of the bank to set aside a preferential transfer of notes, in violation of Revised Statutes, section 5242, is not sustained by proof that the notes were put into the transferee's hands for payment by him, and that instead of paying them he wrongfully kept them. (*Alabama Iron and Railway Co. v. Austin*, 94 Fed. Rep., 897.)
- 3 (U. S. C. C. A., 1900). In an action by the receiver of an insolvent national bank to recover an assessment from defendant as a stockholder, where defendant held stock in another bank as collateral, in lieu of which, on the consolidation of the two banks, it had caused stock in the consolidated bank to be issued to a third person, plaintiff was *held* to have the burden of proving that such exchange was without the authority of the pledgor, so as to amount to a conversion of the original collateral. (*Wilson v. Merchants' Loan and Trust Co. of Chicago*, Ill., 98 Fed. Rep., 688.)
- 4 (U. S. C. C. A., 1900). In a suit by a park board to recover funds alleged to have been misappropriated by its treasurer, from a bank to which funds were paid, evidence of the insolvency of the treasurer, and that such fact was known to the bank, may be shown in support of the charge of misappropriation, although not directly alleged. (*McNulta v. West Chicago Park Com'rs*, 99 Fed. Rep., 900; 2 B. C., 764; *West Chicago Park Com'rs v. McNulta*, ib.)
- 5 (U. S. C. C., 1900). Allegations in a pleading by the receiver of a national bank against the directors, charging them with negligence in permitting the cashier to manage the affairs of the bank without supervision, are not admissible against the successor of such receiver in an action against him by a third party to establish a liability of the bank, the subject-matter of the two suits, as well as the parties, being different. (*School Dist. of City of Sedalia, Mo., v. De Weese*, 100 Fed. Rep., 705.)
- 6 (Ill., App.). An instruction that a party alleging fraud must prove it by a preponderance of the evidence so clear that it leaves the mind well satisfied that the charge is true requires too high a degree of proof, since it is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfied the mind. (*Hutchinson National Bank v. Crow*, 56 Ill. App., 558.)
- 7 (Mich., 1901). In an action by a bank against a former president and director to recover for moneys lost by his negligence in permitting the cashier to borrow on inadequate security, the admission of testimony that the loans to the cashier were not read off at meetings of directors subsequent to the loans, and to show that the notes given by the cashier were not reported to the committee on such matters,

## EVIDENCE—Continued.

## FRAUD, MISAPPROPRIATION, NEGLIGENCE, BURDEN OF PROOF—continued.

- was proper. (*Commercial Bank v. Chatfield*, 86 N. W. Rep., 1015; 3 Banking Cases, 594; 127 Mich., 407.)
- 8 (Mich., 1901). The cashier was asked why he did not request his loan of a full board of directors, and answered, over objection, that it was the custom to discount nearly all the paper before the board knew of it. *Held*, that any error was immaterial, inasmuch as the reply was not prejudicial to defendant. (Ib.)
- 9 (Nebr., 1896). Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor. (*First National Bank of Chadron v. McKinney* (Nebr.), 66 N. W., 280; 47 Nebr., 149.)
- 10 (Wash., 1899). In an action against a national bank, its president and cashier, for damages arising from fraud alleged to have been perpetrated upon plaintiff by defendants, it appeared that certain notes were the property of the bank, that the notes were worthless, the payor being insolvent, and that defendants, without the consent of plaintiff, caused the notes to be forwarded to him and his account with the bank to be charged with the face value of the notes, falsely representing that the notes were taken for a loan of plaintiff's money made by one of the defendants to the maker of the notes, that the maker was solvent, and that the notes would be paid on demand, and that plaintiff was injured thereby to the amount of the verdict. *Held*, that the evidence made a prima facie case against the defendants. (*Pronger v. Old Nat. Bank et al.*, 1 Banking Cases, 399; 20 Wash., 618.)

## MISCELLANEOUS.

*Of protest and notice.*

- 1 (U. S. C. C. A., 1895). In accordance with the provisions of the Minnesota statute (Gen. Stat., 1878, c. 26, sec. 8; Gen. Stat., 1894, sec. 2275) making the certificate of protest of a bill or note of any notary public of that or another State evidence of the fact therein certified, such a certificate is competent evidence in a Federal court sitting in Minnesota of the presentment, demand, dishonor, or notice of dishonor of a note drawn in Minnesota and payable and protested in Connecticut. (*Nelson v. First National Bank of Killingley*, 69 Fed. Rep., 798.)
- 2 (U. S. C. C. A., 1895). A letter written in the ordinary course of business by a clerk in the office of one sought to be charged as indorser of a note, acknowledging the receipt of notice of the protest thereof, is competent evidence of the sending of the notice. (Ib.)

*Expert evidence as to value of stock.*

- 3 (U. S. C. C. A., 1895). Upon the question of the value of stock in a corporation which has been placed in the hands of a receiver, under a statute of the State creating it, in proceedings for its dissolution as insolvent, the opinions of competent witnesses as to the value of the stock are admissible, as is also evidence of the amount and value of the assets and liabilities of the corporation at different times between the appointment of a receiver and the sale of the assets in accordance with the statutory requirements. (*Nelson v. First National Bank of Killingley*, 69 Fed. Rep., 798.)
- 4 (U. S. C. C. A., 1895). Upon the same question it is also admissible to prove the amounts realized at the sales made of the property of the corporation by the receiver under the order of the court, in the regular course of the insolvency proceedings, though taking place at a time remote from that to which the inquiry as to the value of the stock relates. (Ib.)

## EVIDENCE—Continued.

## MISCELLANEOUS—continued.

- 5 (U. S. C. C. A., 1895). A witness ought not to be permitted to give an opinion as to the value of an article when it does not appear that he has acquired any correct information from which to form an opinion, or that he has formed any opinion whatever. (Ib.)

*Expert evidence as to forgeries.*

- 6 (Ala., 1895). In an action to recover the amount paid to the payee and indorser of a check, on the ground that the amount of the check had been raised, where experts had testified that writing could be removed by acids without leaving any trace, and there was evidence that the name of the payee and amount in the check in question had been altered, but none that the check had been subjected to acids, experienced cashiers were properly allowed to testify as to the genuineness of the check, though not shown to be experts as to the effect acids on writing. (Birmingham National Bank v. Bradley, 19 So., 791; 108 Ala., 205.)
- 7 (Ala., 1895). Plaintiff should have been allowed to cross-examine defendant's expert witnesses as to their knowledge of the use and effect of acids in removing ink. (Ib.)

*Of receipt of letter.*

- 8 (Mo.). Depositing in the post-office a letter properly addressed, with postage prepaid, is prima facie evidence that the sendee received it. (Ripley National Bank v. Latimer, 2 Mo. App. Rep., 967.)

*Payment, burden of proof.*

- 9 (U. S. C. C. A., 1896). An indorser on certain notes made a compromise with the indorsee by which he gave his notes for a part of the amount due, he to be released from liability on the original notes upon payment of the compromise notes at maturity. Held, that evidence that money with which he made part payment on the compromise notes was borrowed by him was not admissible on an issue as to whether the indorsee, after accepting such payments was estopped to hold him liable on the original notes. (Humphreys v. Third National Bank of Cincinnati, 75 Fed. Rep., 852.)
- 10 (U. S. C. C. A., 1896). An indorsee of a note agreed to receive, in compromise of an indorser's liability thereon, secured notes for a less amount, the indorsee to have the right if the compromise notes were not paid when due to sue the indorser for the balance remaining due on the original notes after applying thereon the partial payments made on the compromise notes and the proceeds of the security given therefor. Held, that the indorsee did not, by receiving part payments on the compromise notes after their maturity, waive the right to sue the indorser on the original notes. 66 Fed. Rep., 872, affirmed. (Ib.)
- 11 (U. S. C. C. A., 1896). Nor did he waive his right to proceed on the original note by failing to tender back the compromise notes or the security given therefor. (Ib.)
- 12 (Kans., 1894). Where defendant, in a suit by a mortgagee against the mortgagor for the mortgaged property, claims payment of the debt the burden is on him of proving such payment. (First National Bank v. Hellyer, 37 P., 130; 53 Kans., 695.)
- 13 (N. Dak., 1901). Payment of a negotiable instrument, to effect a discharge must be made to the rightful holder or his authorized agent; but the mere possession of such an instrument indorsed by the payee in blank is prima facie evidence of the holder's right to demand and receive payment, and payment to such holder will discharge the instrument, when made in good faith, and in ignorance of facts which impair the holder's title. (Drinkall v. Movius State Bank, 88 N. W. Rep., 724; 11 N. Dak., 10.)

## EVIDENCE—Continued.

## MISCELLANEOUS—continued.

*When appellate court will not weigh evidence.*

- 14 (U. S. Sup. Ct., 1886). Under the acts of Congress authorizing questions arising on a trial or hearing before two judges in the circuit court, and upon which they are divided in opinion, to be certified to the Supreme Court of the United States for decision, each question certified must be one of law and not of fact, nor of mixed law and fact, and it must be a distinct point or proposition clearly stated, and not the whole case nor the question whether upon the evidence the judgment should be for one party or for the other. (*Williamsport National Bank v. Knapp*, 119 U. S., 357; 3 N. B. C., 184.)
- 15 (U. S. C. C. A., 1894). On a writ of error in a case in which a jury has been waived in writing, the court can not inquire whether the special findings are sustained by the evidence; and in the absence of exceptions to the admission or exclusion of evidence, or to rulings upon declarations of law tendered to the court, the review is limited to the question whether the judgment is supported by the pleadings and findings. (*Walker v. Miller*, 59 Fed. Rep., 869.)

*Immaterial error in admission of.*

- 16 (U. S. C. C. A., 1896). When evidence which may have been irrelevant or otherwise open to an objection seasonably taken has been admitted without objection, the witness being examined and cross-examined by the respective parties, it is not error to deny a motion to strike out such evidence, made after its tendency and effect have been disclosed. (*Farmers and Traders' National Bank of Covington, Ky., v. Greene et al.*, 74 Fed. Rep., 439.)
- 17 (U. S. C. C. A., 1899). It is immaterial whether there was error in admitting evidence of irrelevant or immaterial facts stated in special findings. The sufficiency of the facts found is the sole question to be determined. (*Lamson et al. v. Beard*, 1 Banking Cases, 568; 94 Fed. Rep., 30.)
- 18 (Ky., 1902). There can be no reversal for an error in admitting incompetent testimony to establish a fact the existence of which the instructions asked by both parties assumed. (*First Nat. Bank v. Germania Safety Vault and Trust Co.*, 66 S. W. Rep., 716; 4 Banking Cases, 291.)
- 19 (Minn., 1899). Conceding, without deciding, that certain evidence introduced is incompetent, and that it was error to admit it, it was error without prejudice, when the fact sought to be proved by it was conclusively proved by other evidence. (*Selover v. First Nat. Bank of Minneapolis*, 1 Banking Cases, 739.)

*Action by indorsee of nonnegotiable note, proof.*

- 20 (W. Va., 1895). In an action by the assignee of an invalid nonnegotiable instrument against the assignor thereof, plaintiff must show that the maker was insolvent when the instrument was made or became due, or that he used diligence to recover from the maker, and failed, or that suit against the maker would have been of no avail. (*Merchant's National Bank v. Spates*, 23 S. E., 681; 41 W. Va., 27.)

*Of impairment of business because of dishonor of check.*

- 21 (Tenn., 1900). In an action against a bank for damages for breach of contract in refusing to honor a depositor's check, plaintiff can not show that certain persons have ceased to deal with him because of the dishonor of his checks by defendant, unless the loss of their custom is set out in the pleadings as special damages. (*The J. M. James Co. v. Continental Nat. Bank*, 2 Banking Cases, 573; 105 Tenn., 1.)

*Of receiving deposits after insolvency.*

- 22 (Colo., 1900). In the prosecution against the president of a bank for receiving deposits after its insolvency, it is not necessary to show any specific intent to injure another upon the part of defendant; and if defendant has been criminally negligent in not informing himself as

## EVIDENCE—Continued.

## MISCELLANEOUS—continued.

to the condition of the bank, that fact, coupled with proof that he did the act prohibited, will be sufficient to warrant a conviction. (McClure v. People, 2 Banking Cases, 728; 27 Colo., 358.)

23 (Colo., 1900). In such a prosecution, if it appears that defendant had, by the exercise of the degree of care required of him, obtained information which led him to believe that the bank was solvent when the deposit was received, a conviction is not warranted, although the bank was insolvent; and, therefore, in such a proceeding, evidence tending to show what steps defendant had taken in the way of informing himself regarding the solvency of the bank was admissible. (Ib.)

24 (N. Y., 1900). In an action against a bank director to recover deposits received after the bank's insolvency, where defendant's liability is predicated upon the claim that he fraudulently suppressed his knowledge of such insolvency, defendant's testimony as to his belief in regard to the condition of the bank is competent evidence and entitled to be weighed by the jury with the other evidence in determining what was his intent. (Cassidy v. Uhlmann, 2 Banking Cases, 661; 163 N. Y., 380.)

*Of trust deposit.*

25 (S. Dak., 1901). In an action against the receiver of a bank to have the proceeds of certain notes collected by the bank declared a preferred claim as a trust fund, the funds in the bank at the time of its insolvency having amounted to less than plaintiff's claim, it was proper to admit in evidence judgments recovered by certain preferred creditors of the bank, in order to show that there were preferred creditors entitled to share pro rata in the funds in the bank at the time of its insolvency. (McCormick Harvesting Mach. Co. v. Yankton Sav. Bank et al., 87 N. W. Rep., 974; 4 Banking Cases, 81; 15 N. Dak., 196.)

*Of agreement to pay interest on deposits.*

26 (N. Y.). On an issue as to whether the deposits of plaintiff's testator in defendant bank were interest bearing, evidence of the value of the use of money in vicinity of the bank, and that testator received interest on similar deposits in other banks, and that one bank offered him 5 per cent on any money that he might deposit, is admissible in rebuttal of defendant's evidence that the agreement between the parties, by which testator's account should be interest bearing, was abrogated by a subsequent agreement that it should not bear interest. Merwin, J., dissenting. (McLoghlin v. National Mohawk Valley Bank (Sup.), 20 N. Y. S., 171.)

*Of motive in procuring issuance of attachment.*

27 (Utah, 1893). In an action for malicious prosecution of an attachment it is not error to refuse to permit plaintiff to testify whether defendant had any motive in procuring the issuance of the attachment other than an honest desire to collect a debt, and to limit him to a statement of the facts. (Hamer v. First National Bank of Ogden, Utah, 33 P., 941; 9 Utah, 215.)

*Nature of law case can not be shown by affidavit.*

28 (U. S. C. C. A., 1899). Where an order dismissing a law case is pleaded in bar in an equity suit, and no proof is offered except the order itself, defendant can not show the nature of the law case by affidavit after trial. (Alabama Iron and Railway Co. v. Austin, 94 Fed. Rep., 897.)

*Evidence that assignment was made for the benefit of the bank.*

29 (U. S. Sup. Ct., 1902). Cross, who was president of a bank and had been misusing its funds, gave to Martindale two instruments of assignment,

## EVIDENCE—Continued.

## MISCELLANEOUS—continued.

providing that Martindale should pay himself for any paper on which Cross and Martindale were mutually makers or indorsers. The bank and other parties held such paper. Cross killed himself the day after the assignment was given. There was an earlier assignment to Martindale as trustee. The receiver of the bank alleged that the earlier assignment was made to protect the bank. Martindale was the only witness as to delivery of the assignment and admitted that it was for the benefit of the bank but only to a limited amount. *Held*, in an action in which other holders of paper made by Cross and Martindale sought to obtain the proceeds of sale of the property assigned, that it was not error to admit testimony that Martindale had stated that the earlier assignment had been made to secure the bank generally for Cross's liability thereto. (Fourth National Bank v. Albaugh, 188 U. S., 734.)

*Weight of testimony—Contradictory statements of witness—Effect.*

- 30 (U. S. C. C., 1903). The fact that a witness, testifying that in a certain transaction he acted as agent for a bank, had stated in contradiction of this that he was acting individually, affects only the weight of his testimony, and does not disprove his agency. (*Hallett v. Fish*, 120 Fed. Rep., 986.)

*Bank's insolvency—Aid of third person—Inducement by cashier—Agency for bank—Sufficiency of evidence.*

- 31 (U. S. C. C., 1903). Evidence in an action by one furnishing aid to an insolvent bank (being induced thereto by its cashier) to recover from the receiver, as a preferred creditor, considered, and *held* to show that the aid was furnished to the cashier in his official capacity as representative of the bank and not as an individual. (*Ib.*)

## EXECUTION.

*No lien can be established after receiver is appointed.*

- 1 (U. S. Sup. Ct., 1871). A judgment against a national bank in the hands of a receiver only establishes the validity of the claim; the plaintiff will not have any lien on the property of the association nor secure any preference over other creditors. (*First National Bank of Bethel v. National Pahquioque Bank*, 14 Wall, 383.)

*Sheriff may not levy on real estate outside his county.*

- 2 (U. S. C. C., 1898). A sheriff in Texas has no power to levy upon or sell land lying outside his county, and his deed, describing by metes and bounds land purporting to have been levied on and sold, part of which lies outside his county, is void as to such part. (*Short v. Hepburn*, 75 Fed. Rep., 113.)

*Appointment of examiner does not prevent execution.*

- 3 (U. S. C. C., 1898). That a national bank for which no receiver has yet been appointed is in charge of an examiner appointed by the Comptroller to investigate its affairs does not exempt its tangible assets from execution upon final judgment. (*Kimball v. Dunn*, 89 Fed. Rep., 782.)

*Description in notice of sheriff's sale.*

- 4 (Ill.). The imperfect description of property in a notice of sheriff's sale under execution will not necessarily vitiate the sale where the description is sufficiently certain so that no one is deceived as to the identity of the property sold. (*Grundy County National Bank v. Rulison*, 61 Ill. App., 388.)

## FALSE ENTRIES. (See OFFICERS, CRIMINAL LIABILITY OF.)

## FORFEITURE OF CHARTER.

## CROSS REFERENCES:

## Loans—

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Government only can have forfeiture declared for loans in excess of limit ----- 269

*Charter of national bank forfeited owing to the directors having knowingly violated, and permitted its officers to violate, the Revised Statutes of the United States.*

- 1 (U. S. C. C., 1887). The Fidelity National Bank and the directors of said bank having knowingly violated, and permitted its officers to violate, the provisions of the Revised Statutes of the United States.

1. By making loans to divers persons on the security of the shares of its own stock, said security not being necessary to prevent loss on debts previously contracted in good faith.

2. By increasing its liabilities by making new loans and discounts otherwise than by discounting or purchasing bills of exchange payable at sight when its reserve was below the amount fixed by law.

It is thereupon considered and adjudged by the court that all the rights, privileges, and franchises of the said association, the Fidelity National Bank of Cincinnati, Ohio, are hereby forfeited, and said association is hereby declared, adjudged, and decreed to be dissolved. (Trenholm v. The Fidelity National Bank. Transcript from journal U. S. Circuit Court, Southern District of Ohio. The case not being reported.)

*Charter can be forfeited only for acts done by the directors or by executive officers with the knowledge of the directors.*

- 2 (U. S. C. C., 1889). In an information charging that "the banking association and the directors thereof did knowingly permit," etc., the allegation that the association, aside from the directors, permitted the doing of the alleged acts, tenders an immaterial issue, and should be stricken out on motion. (Trenholm, Comptroller, v. Commercial National Bank, 38 Fed. Rep., 323.)

- 3 (U. S. C. C., 1889). As section 5239 only refers to acts done by the directors, or by the executive officers with the knowledge of the directors, an information, seeking a forfeiture, which charges that the association did the act is insufficient. (Ib.)

*Forfeiture of charter can be adjudged only in a suit brought by the Comptroller and the association will stand until so dissolved.*

- 4 (Colo.). A forfeiture of the rights and privileges of a national bank must be adjudged by a proper court of the United States in a suit instituted for that purpose by the Comptroller, in his own name, and the association must stand until so dissolved. (Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 1 Colo., 531.)

- 5 (Pa., 1879). Forfeiture of the privileges and powers of a national bank must be determined by a suit brought by the Comptroller of the Currency, and until determined it may do business, and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money loaned by it upon personal security in the manner authorized. (Stephens v. Monongahela National Bank of Brownsville, 88 Penn. St., 157; 32 Am. Rep., 438; 2 N. B. C., 398.)

*Limitations in actions for.*

- 6 (U. S. C. C., 1890). The forfeiture of the rights, privileges, and franchises of a bank authorized by Revised Statutes, section 5239, for violation by its directors of the provisions of the banking act, comes within section 1047, limiting suits for any penalty or forfeiture accruing under the laws of the United States to five years. (Welles v. Graves, 41 Fed. Rep., 459.)

*Forfeiture of charter not necessary before receiver may bring suit against directors.*

7. The receiver of a national bank may maintain a suit to enforce the liability of directors under section 5239 without the charter of the

## FORFEITURE OF CHARTER—Continued.

bank having been first forfeited in a suit brought by the Comptroller of the Currency under that section.

(U. S. C. C. A., 1898) *Cockrill v. Cooper et al.*, 86 Fed. Rep., 7;

(U. S. C. C., 1890) *Stephens v. Overstolz*, 43 Fed. Rep., 771-772;

(U. S. C. C., 1897) *National Bank of Commerce of Tacoma v.*

Wade, 84 Fed. Rep., 10, 13, 14.

3 *Thomp. Corp.*, 4113-4303.

*Contra.*

(U. S. C. C., 1890) *Welles v. Graves*, 41 Fed. Rep., 459-468;

(U. S. C. C., 1896) *Gerner v. Thompson et al.*, 74 Fed. Rep., 125,

131; *Hayden v. Thompson* (U. S. C. C. A.), 71 Fed. Rep., 60, distinguished.

## FORGED OR ALTERED PAPER.

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NEGLIGENCE OF DEPOSITOR IN NOT EXAMINING VOUCHERS—EXAMINATION OF VOUCHERS BY AGENT COMMITTING FORGERY.

- 1 (U. S. C. C. A., 1902). Where a dealer in corn arranged with a bank to cash the checks of his purchasing agent, such checks to be sent to the dealer from time to time with drafts for the amount thereof, and such agent drew and had cashed at such bank checks purporting to but in fact not representing any purchase of corn, and indorsed by himself, and bearing the fictitious indorsement of the pretended payee, if the indorsement by such agent was irregular, it was the duty of such dealer, on the first of such checks being sent to him by the bank, to have notified the bank of such fact, and until so notified the bank was not negligent in receiving and paying such checks. *Armour v. Greene County State Bank*, 112 Fed. Rep., 631.)
- 2 (Ala., 1893). A depositor owes a duty to the bank to make an examination of his pass book and vouchers within a reasonable time; and if loss would result to the bank from his failure to do so he can not recover for forged checks paid by the bank and charged to his account. (*First National Bank v. Allen*, 14 So., 335; 100 Ala., 476.)
- 3 (Ala., 1893). Where the examination is committed to a clerk or agent who has himself committed the forgeries, his concealment of such forgeries will not relieve the depositor from the consequences of the failure to discover the fraud and notify the bank. (Ib.)
- 4 (Ala., 1893). But if the omission of the depositor to discharge such duty has resulted in no injury to the bank, the depositor may recover. (Ib.)
- 5 (Ala., 1893). Where, however, forgeries by the same person are committed after the depositor is chargeable with knowledge of the fact, the failure of the depositor to give the bank notice may estop him to dispute the genuineness of such checks. (Ib.)
- 6 (Mo. Appls., 1902). Where a depositor, by retaining without objection his bank book as balanced and returned to him, together with the canceled checks, recognizes the balance shown as an account stated, the



## FORGED OR ALTERED PAPER—Continued.

## NEGLECTANCE OF DEPOSITOR IN NOT EXAMINING VOUCHERS—EXAMINATION OF VOUCHERS BY AGENT COMMITTING FORGERY—continued.

- burden of proof is on him to show that the balance was in fact based on the payment of forged checks. (*Kenneth Inv. Co. v. National Bank of Republic, of St. Louis*, 5 B. C., 13; 70 S. W., 173.)
- 7 (N. Y.). Where a bank has paid raised checks, the depositor is not estopped from bringing an action against the bank to recover the amounts thereby obtained by failing to examine his bank account and vouchers when returned to him by the bank, whereby he would have discovered that the checks had been raised, and thus prevented further acts of such kind. (*Critten v. Chemical Nat. Bank*, 70 N. Y. S., 246; 60 App. Div., 241.)
- 8 (N. Y.). A depositor's bookkeeper, after procuring the signature of his employer to checks for the pay roll, raised and cashed them, retained the excess, and when they were returned as vouchers, with a statement, he reduced them to the original amounts, altered the statement to correspond, and reported their correctness to his employer, who had an expert examine the accounts monthly. *Held*, that the depositor's failure to personally examine the vouchers and statements, or the accountant's failure to examine the statements, did not constitute negligence as against the bank. (*Clark v. National Shoe and Leather Bank*, 52 N. Y. S., 1064.)
- 9 (Pa., 1899). In an action to recover a sum deposited with the defendant bank, and alleged to have been paid out by it on forged checks, it appeared from plaintiff's evidence that during a period of over two years plaintiff's confidential clerk and bookkeeper, who was specially intrusted with the business of attending to his bank account, making deposits with defendant, etc., forged checks to the amount of the claim, which were paid by defendant, and charged to plaintiff in his bank book; that such bank book was balanced twelve times during such period, and the first settlement included two of the forged checks; and that it would have appeared, upon proper examination by plaintiff, that the bank had charged him with the payment of the first two forged checks, for which no vouchers appeared among the checks handed to him by his clerk, they having been abstracted and destroyed by the latter. *Held*, that plaintiff's failure to object within a reasonable time to the payment of the forged checks included in the first settlement gave the bank a right, in afterwards honoring checks signed by the same person, to assume that their signatures had been at least tacitly recognized by plaintiff as genuine; and that a verdict was properly directed for defendant. (*Myers v. Southwestern Nat. Bank*, 2 Banking Cases, 74; 193 Pa. St., 1.)
- 10 (Pa.). Depositors, on return by the bank of their paid checks, are not bound to examine them to see that the indorsements are correct. (*United Security Life Insurance and Trust Co. v. Central Nat. Bank*, 40 A., 97; 185 Pa. St., 586; 42 W. N. C., 145.)
- 11 (Tenn., 1897). In a suit against a bank to recover money paid by it on checks drawn by complainant, payable to T.'s order, and delivered to W., who forged indorsements thereof by T., it appeared that his transactions with W. covered a period of eighteen months, during which he turned over to W. 35 checks, all payable to T.'s order, 32 of which were paid on indorsements like those on the 3 checks in question, and all of which complainant claimed were forgeries; that during such period his account was balanced three times, and he never examined it until after "this litigation" arose; and that he knew T.'s signature, and the signature on all the checks were forgeries, except possibly two. *Held*, that recovery was not prevented by negligence of the complainant, it appearing that there had been no loss to complainant or the bank on account of the 32 checks, and hence no cause to challenge an inspection of the indorsements thereon. (*Pollard v. Wellford*, 42 S. W., 23; 99 Tenn., 113.)

## FORGED OR ALTERED PAPER—Continued.

## NEGLECTANCE OF DEPOSITOR IN NOT EXAMINING VOUCHERS—EXAMINATION OF VOUCHERS BY AGENT COMMITTING FORGERY—continued.

*When depositor liable for his agent's forgeries.*

- 12 (U. S. C. C. A., 1899). A bank *held* entitled to recover from a depositor the amount of a check forged by an agent of such depositor, and indorsed and deposited by him under a power of attorney authorizing such indorsement and deposit, which check was credited to the depositor's account, and the amount drawn and embezzled by the agent. (*Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*, 97 Fed. Rep., 181; 2 B. C., 172.)
- 13 (U. S. C. C. A., 1899). A bank is not guilty of negligence or of a violation of the usual rules and customs of banking by crediting at once as cash to the account of a depositor the amount of a check indorsed and delivered for deposit by the authorized agent of the depositor; and permitting such amount to be subsequently drawn out by the agent prior to the collection of the check does not constitute an overdraft. (Ib.)

## NEGLECTANCE BETWEEN BANKS IN NOT GIVING NOTICE OF.

- 1 (U. S. C. C., 1886). The right of the United States Government to recover money paid on a check on the Treasury, under a forged indorsement, is conditioned on promptness in giving notice to the person to whom the check was paid. (*United States v. Clinton National Bank*, 28 Fed. Rep., 357.)
- 2 (Ill., 1894). In an action by a bank which has paid to another bank a check drawn on the former bank and transferred to the latter by a forged indorsement, it is immaterial whether the signature of the drawer of the check is genuine, since both parties are estopped to deny its genuineness. (*First National Bank of Chicago v. Northwestern National Bank of Chicago*, Ill., 38 N. E., 739; 152 Ill., 296.)
- 3 (Ind., 1894). Plaintiff bank paid defendant bank money on a forged order, made payable at plaintiff bank, bearing the general indorsement of the payee and of defendant, the latter being "For collection." The person by whom the order purported to be drawn was a customer of plaintiff, and had directed it to pay orders drawn by him. The forgery was not discovered for four weeks. *Held*, that an answer alleging that at the time of the payment the payee had property from which the order could have been collected, but that before the discovery of the forgery the payee had departed with his property, was not sufficient to prevent recovery of the money paid defendant, as it did not show how long the payee and the property remained within reach, and therefore failed to show loss to defendant by unreasonable delay of plaintiff in discovering the forgery and notifying defendant. (*Indiana National Bank v. First National Bank*, 36 N. E., 382; 9 Ind. App., 185.)
- 4 (N. Y.). Defendant bank received a check drawn on plaintiff for collection. After plaintiff had remitted to defendant, and defendant had paid the holder of the check, it was discovered that the payee's name was forged. *Held*, that delay of plaintiff in not notifying defendant of the forgery did not relieve defendant from liability, where the only evidence of injury from the delay was that of defendant's cashier, who said: "If more seasonable notice had been given the forger would have been arrested earlier, and more favorable results might have arisen." (*Third National Bank v. Merchants' National Bank*, 27 N. Y. S., 1070.)

*Payment of forged check without identification—Negligence.*

- 5 (Wash. Sup., 1902). Where a bank, without inquiry or identification of the person presenting a forged check drawn on another bank, pays such check, and indorses and presents it to the drawee, where it is paid without discovering the forgery, and in reliance upon such

## FORGED OR ALTERED PAPER—Continued.

## NEGLECTANCE BETWEEN BANKS IN NOT GIVING NOTICE OF—continued.

indorsement, on subsequently discovering the forgery and demanding the money paid to the paying bank, before such bank has been placed in any worse position than it would have been had the drawee refused payment when the check was presented to it, the drawee may recover from such paying bank the amount so paid. (*Canadian Bank of Commerce v. Bingham*, 5 B. C., 140; 71 Pac. Rep., 43.)

## LIABILITY OF BANK TO DRAWER FOR NEGLIGENCE.

- 1 (U. S. C. C. A., 1899). Although a bank is informed that an agent is authorized to draw checks upon it for the "use of" the principal, in the absence of circumstances calculated to arouse suspicion that a check drawn by the agent is for some fraudulent purpose of its own, there is no duty upon the bank to inquire into the purposes of the check, or the use to which the money is to be put. (*Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank of Detroit, Mich.*, 2 Banking Cases, 172; 97 Fed. Rep., 181.)
- 2 (Ohio). Where the person whose name is to a check as its drawer has no individual account with the bank, the bank, by paying the check and charging it to such person as administrator, thereby delaying for three months the discovery of the fact that the check is a forgery, is negligent. (*First Nat. Bank of Belmont v. First National Bank of Barnesville*, 50 N. E., 723; 58 Ohio St., 207.)
- 3 (Ohio). Presentation of a check for payment by a bank which is the indorsee "for collection" does not justify the drawee bank in relaxing any of its vigilance in determining whether the name of the drawer is genuine. (*Ib.*)

## MISTAKE OF DRAWER AS TO IDENTITY OF PAYEE.

- 1 (Ind., 1901). H. secured a loan from plaintiffs, giving a note and mortgage therefor by the name of D., under the false representation that his name was D., and that he owned the land. The loan was turned over by a check on defendant bank. H. indorsed the check as D., and again as H. *Held*, that H., and not D., was the intended payee of the check, and he was entitled to payment as between himself and the bank, and the bank, having no notice of the fraud, was not liable to plaintiff for the amount of the check. (*Meyer et al. v. Indiana Nat. Bank*, 61 N. E. Rep., 596; 4 Banking Cases, 54.)
- 2 (Pa., 1900). A. was introduced to a trust company by a responsible party as B. The company, in the pursuance of a business transaction, gave A. its check drawn on itself to the order of B. This check, fraudulently indorsed in the name of B., was deposited in the defendant bank by R., who had opened an account with it, and was collected by the bank of the trust company, and its proceeds drawn out of the bank by R. So far as it appeared from the evidence, all parties to the transaction acted in good faith except A. *Held*, that the trust company could not recover from the bank the money paid on the check. (*Land Title and Trust Co. v. Northwestern Nat. Bank*, 2 Banking Cases, 588; 196 Pa. St., 230.)
- 3 (R. I., 1901). Public Laws (Rhode Island), 1899, chapter 674, section 31, declares that a signature to a negotiable instrument, which is made without authority, or forged, shall be wholly inoperative, and shall not give a right to enforce payment against a party thereto. A check drawn payable to the order of A. was procured by representations that the person to whom it was given was A., and the indorsement of the latter was forged thereto, and it was paid by the bank. *Held*, that the bank was liable to the drawer for such sum, both at common law and under the statute. (*Tolman v. American Nat. Bank*, 3 Banking Cases, 258; 22 R. I., 462.)

## FORGED OR ALTERED PAPER—Continued.

## LIABILITY OF BANK TO DRAWER FOR PAYMENT OF CHECK WHEN NAME OF PAYEE OR INDORSEE IS FORGED.

- 1 (Cal., 1902). Where a bank paid a check to another than the payee, upon a forged indorsement, such bank acquired no right against the drawer either to reimbursement or to retain the check. (*Garthwaite et al. v. Bank of Tulare*, 4 Banking Cases, 8; 134 Cal., 237.)
- 2 (Cal., 1902). Where the addressee and payee of a check sent by mail never received the same, and it was paid by the drawee on a forged indorsement, a demand of payment by the payee was in legal contemplation as agent of the owner of the check, and was a good demand. (Ib.)
- 3 (Cal., 1902). Where a check was paid by the drawee on a forged indorsement, a subsequent verbal demand of payment by the payee was good, without a physical presentation of the check; the possession of the check by the drawee obviating the necessity of such presentation. (Ib.)
- 4 (Cal., 1902). Where a debtor purchased a bank's check on another bank, payable to his creditor, and such check, having been lost during transmission through the mail, was paid by the drawee on a forged indorsement, demand by the payee, and notice to the drawer of the drawee's refusal to pay, fixed the liability of the former to the original purchaser for the amount paid by him for the check. (Ib.)
- 5 (Colo., 1902). Where a bank had no knowledge that the drawer of a check was not satisfied that the person receiving the check as payee was the person therein named as payee and took his receipts therefor it can not claim that such circumstances amount to a direction from the drawer to pay without reference to identification or to the genuineness of the indorsement, so as to relieve the bank from liability for paying to the wrong person, it having paid to another bank which had in the first instance paid the check, and in so doing relied solely on the indorsements. (*Western Union Tel. Co. v. Bimetallic Bank*, 4 Banking Cases, 373.)
- 6 (Colo., 1902). Where a bank paid a check simply upon the face of the indorsement, which was made by one "Daley" while the check was payable to one "Daily," that fact was amply sufficient to have placed the bank upon its guard and caused it to have made some inquiry as to whether it was paying to the proper person. (Ib.)
- 7 (Colo., 1902). Payment having been made upon the written indorsement only, no question of idem sonans can arise. (Ib.)
- 8 (Ill.). The burden of showing the authority of a stranger to a check to indorse it for the payee is upon the drawee if he would escape liability to pay the same over again to the payee. (*Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App., 166.)
- 9 (Ill.). The drawer of a check delivered it to one who had applied for a loan as agent of the payee, and who gave the drawer notes and a trust deed purporting to be signed by said payee; but the latter had not authorized the transaction and never received the check, which was paid by the drawee bank on a forged indorsement of the payee's name. *Held*, that the bank was liable to the drawer of the check, since it never became the property of the payee. Judgment (68 Ill. App., 562) affirmed. (*First Nat. Bank v. Pease*, 48 N. E., 160; 168 Ill., 40.)
- 10 (Ind.). Where a husband learns that his wife has forged checks on his bank account, which have been paid, and he examines the checks and pass book, but does not make any complaint to the bank, the latter is liable to him for the payment of future checks forged by the wife. (*Neal v. First Nat. Bank*, 60 N. E., 164; 26 Ind. App., 503.)
- 11 (Iowa, 1897). A bank which delivered to the supposed agent of a borrower its check on another bank for the amount of the loan, payable to the borrower, is not bound by the act of such agent in procuring

## FORGED OR ALTERED PAPER—Continued.

## LIABILITY OF BANK TO DRAWER FOR PAYMENT OF CHECK WHEN NAME OF PAYEE OR INDORSEE IS FORGED—continued.

- the money from a third bank on a forged indorsement of the borrower's name, though he was at the time acting as the drawer's agent. (*German Sav. Bank v. Citizens' Nat. Bank*, 70 N. W., 769; 101 Iowa, 530.)
- 12 (Ky., 1899). The payment by a bank of a check to any person save the payee himself, unless it be payable to bearer, is a payment at its peril; and if the indorsement is forged, it is a payment out of the bank's funds, and the depositor can not be charged therewith. (*Rice et al. v. Citizens' Nat. Bank*, 1 Banking Cases, 512; 51 S. W., 454; see note at end of case.)
- 13 (Ky., 1899). A bank receiving a deposit with instructions to honor the checks of a certain person to certain parties does not thereby become the agent of the depositor, but merely his debtor. (*Ib.*)
- 14 (Ky. Appls., 1903). Defendant cashed some checks belonging to plaintiff for plaintiff's agent, who had indorsed plaintiff's name thereon without authority, and thereafter defendant collected the amount of the checks from the banks on which they were drawn. *Held*, that defendant was liable to plaintiff for the proceeds of the checks, though he had acted in good faith and without knowledge of the agent's forgery. (*Meyer v. Chas. Rosenheim & Co.*, 5 B. C., 598; 73 S. W. Rep., 1129.)
- 15 (Ky., 1899). Where money is paid upon a pretended, not a real, indorsement of the name of the payee, in law the check remains unpaid, and can not diminish the funds of the drawer in the bank, or deprive the payee of any right; and this rule applies where the check was refused by the payee because written with a pencil, and carelessly thrown away by the drawer in the presence of the payee, and paid on a forged indorsement of the payee's name, prior to the presentation of a similar check written in ink, and bearing a genuine indorsement by the payee. (*Henderson Trust Co. v. Ragan et al.*, 2 Banking Cases, 92; 52 S. W., 848.)
- 16 (Mass., 1898). Payment by a bank to the holder of a check on which is forged the name of the payee or indorsee makes the bank liable to the depositor as if the pretended payment had not been made, since nothing but actual payment, accord, and satisfaction, or a release under seal, is an answer to the depositor's demand. (*Winslow v. Everett Nat. Bank*, 51 N. E., 16; 171 Mass., 534.)
- 17 (N. J., 1899). The implied contract on the part of a bank with its depositor is that it will disburse the money standing to his credit only on his order and in conformity with his directions; and therefore if it makes a payment on a check to which his name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and can not charge the amount against the depositor, unless it shows a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor. (*Mechanics' Nat. Bank of Trenton v. Harter et al.*, 2 Banking Cases, 81; 63 N. J. L., 578.)
- 18 (Pa. Sup., 1903). Where a bank pays a check to one presenting it under a forged indorsement the bank may recover back the money by action in assumpsit. (*Second Nat. Bank of Pittsburg v. Guarantee Trust and Safe Deposit Co. of Shamokin*, 5 B. C., 603; 56 Atl. Rep., 72.)
- 19 (Va., 1897). A stranger, with whom a firm sustained no business relation, received from its cashier a bank check for \$10 in exchange for \$10 in currency. When the check was presented to and paid by the bank it had been raised to \$500. *Held*, that the bank was liable for the loss, the firm's negligence being too remote to affect the forgery. (*National Bank v. Nolting*, 26 S. E., 826; 94 Va., 263.)

## FORGED OR ALTERED PAPER—Continued.

## LIABILITY BETWEEN BANKS FOR PAYMENT OF FORGED CHECK.

- 1 (Mass., 1901). Where forged checks, payable to cash and undorsed, were paid by a bank through the clearing house to another bank which had credited a depositor therefor, the bank paying could not recover the amount of the checks, since it should have known the genuineness of the signature of the maker, and the payee in no way deceived it. (*Dedham Nat. Bank v. Everett Nat. Bank*, 59 N. E. Rep., 62; 3 Banking Cases, 128; 177 Mass., 392.)
- 2 (N. Y.). If one draws money from another's account in a bank on a forged check, and then restores it by depositing in the same account a forged check on another bank, which the latter pays, the former bank is not liable to restore to the other bank the amount received by it on the second forged check. (*Nassau Bank v. National Bank of Newburgh*, 52 N. Y. S., 1118.)
- 3 (N. Y., 1899). Where the drawee bank pays a draft when it is chargeable with notice that the body of the draft has been forged or altered, it can not recover the amount from another bank to which it is paid, if the latter was entitled to rely on such payment when it became the holder of the draft, and if such recovery would result in injury to the latter. (*Continental Nat. Bank of New York v. Tradesmen's Nat. Bank of New York*, 1 Banking Cases, 103; 55 N. Y. S., 545; 36 N. Y. App., 112.)

## WHEN BANK MAY OR MAY NOT RECOVER MONEY PAID ON FORGED CHECK.

- 1 (Iowa, 1899). Where a bank upon which a check is drawn pays it upon the forged signature of the drawer to a good-faith holder, the money can not be recovered from such holder as paid under a mistake of fact, unless the holder was negligent in not making due inquiry when he took the check. (*First Nat. Bank of Marshalltown v. Marshalltown State Bank*, 1 Banking Cases, 179; 107 Iowa, 327.)
- 2 (Iowa, 1899). The negligence of the bank which cashes a check and puts it into circulation can not be imputed to another bank to which it is sent and by which it is credited to the first-mentioned bank. (Ib.)
- 3 (Iowa, 1899). Where a check to which the signature of the drawer is forged is paid by the drawee bank to a good-faith holder, the fact that the payee's indorsement is also forged is immaterial to the drawee. (Ib.)
- 4 (Me., 1898). If a bank pay to an innocent holder for value the amount of a check purporting to be drawn upon it by one of its depositors, but the signature to which was in fact forged, the bank can not recover back the amount from such holder. (*Neal et al. v. Coburn*, 1 Banking Cases, 166; 92 Me., 139.)
- 5 (Me., 1898). If such a holder, on demand, repay the amount to the bank, that does not entitle him to recover the amount from a prior innocent holder for value, who had indorsed the check. (Ib.)
- 6 (Tenn. Sup., 1896). The indorsement of a bank draft by the payee to the order of a fictitious person in good faith, and believing him to be real, is not in law an indorsement to bearer, such not being the intention of the indorser; and the indorsement of the name of the fictitious indorsee by a third person without authority is a forgery, and does not protect the bank in payment of the draft. (*Chism v. First National Bank*, 36 S. W., 387; 96 Tenn., 641.)
- 7 (Tex., 1898). A bank which pays a forged draft purporting to be drawn by a regular depositor, in the hands of an innocent purchaser for value who is without negligence, can not recover the payment thus made when it discovers the forgery. (*Moody v. First Nat. Bank*, 46 S. W., 660; 19 Tex. Civ. App., 278.)
- 8 (Tex., 1897). A bank can not recover money paid to a person on a forged check having a signature differing materially from the genuine, where defendant was not acquainted with the depositor or his signature, did nothing to mislead the bank except to inquire whether a check for a

## FORGED OR ALTERED PAPER—Continued.

## WHEN BANK MAY OR MAY NOT RECOVER MONEY PAID ON FORGED CHECK—continued.

certain amount signed by the depositor would be honored, and where defendant has delivered property in reliance on such payment, whereby he would suffer loss if required to refund the money. (*Iron City Nat. Bank v. Peyton* (Tex. Civ. App.), 39 S. W., 223; 15 Tex. Civ. App., 184.)

*When bank may recover from payee of forged check.*

- 9 (Ga., 1902). The rule that a drawee is presumed to know his drawer's signature, and hence can not recover back money paid through a mistake of fact upon a bill to which the drawer's signature was forged, is not available in favor of a holder who by his own negligence contributed to the success of the fraud practiced, and whose conduct had a tendency to mislead the drawee, who was himself free from fault. (*Woods et al. v. Colony Bank*, 40 S. E. Rep., 720; 4 Banking Cases, 254; 114 Ga., 683.)

## EVIDENCE OF FORGERY, INSTRUCTIONS.

- 1 (Ky., 1902). In an action against a bank to recover a deposit in which plaintiff by reply denied that a check for the amount sued for, which defendant had paid, was signed by her, or by her authority, it was error to instruct the jury that, in order to find for defendant, it must believe that the check was signed by plaintiff, but the court should, as requested by defendant, have instructed the jury to find for defendant if it believed that the check was signed by plaintiff, "or by another for her and with her consent, or by her authority." (*Phoenix Nat. Bank v. Taylor*, 67 S. W. Rep., 27; 4 Banking Cases, 366.)
- 2 (Ky., 1902). If plaintiff received the proceeds of the check with knowledge of the fact that the money had been paid by defendant thereon, or the money was deposited to plaintiff's credit in another bank, and drawn out by her or her authority, she was not entitled to recover, and the court should have so instructed the jury, as requested by defendant. (*Ib.*)
- 3 (Ky., 1901). Under a plea of non est factum to an action by a bank on a promissory note which was placed in the bank by its president, who soon thereafter absconded, being a confessed forger and defaulter, it was admissible for defendants, the executors of the person whose name was signed to the note, to prove that the president, after the note sued on was discounted, had in his possession other notes purporting to have been signed by testator, and which were manifestly forgeries, as the transactions were logically connected, and when considered together authorize the conclusion that all the notes were prepared by the president to conceal his delinquency, with the intention to use them as it became necessary; and, besides, the fact that he forged testator's name to the other notes would be admissible, at least, to show his capacity to imitate the signature. (*First Nat. Bank of Paducah v. Wisdom's Ex'rs*, 63 S. W. Rep., 461; 3 Banking Cases, 483.)
- 4 (Pa. Sup.). In an action on a note by a bank against the indorser, who alleges his signature to be a forgery, evidence by the cashier and teller of the bank that the indorser had admitted the genuineness of his signature on another note, not in evidence, and that such other signature was precisely the same as the signature to the note in suit, is not competent for the purpose of estopping the indorser from denying such signature. (*Second Nat. Bank of Reading v. Wentzel*, 24 A., 1087; 151 Pa. St., 142.)
- 5 (Pa. Sup.). Testimony by the teller of the bank that the indorser had admitted his signature to a note for which the one in suit was given as a renewal is properly stricken out as irrelevant, where the teller subsequently acknowledges that the indorser's admission related to another note, not connected with the one in suit. (*Ib.*)

## FORGED OR ALTERED PAPER—Continued.

## EVIDENCE OF FORGERY, INSTRUCTIONS—continued.

- 6 (Pa. Sup.). Evidence by defendant, on cross-examination, denying that he had received the proceeds of other notes, not in suit, which had been indorsed by him, and which had been negotiated by the maker, who also negotiated the one in suit, can not be contradicted by plaintiff in rebuttal, since such cross-examination related to an irrelevant matter. (Ib.)
- 7 (Pa. Sup.). In an action against an indorser on a renewal note, who was released from liability on the original note because it was not protested for nonpayment, it is error to charge that there may be a recovery if the indorsement on the first note was genuine, notwithstanding the indorsement on the renewal note was a forgery; but the jury having found for the indorser, plaintiff can not complain of such instruction. (Ib.)
- 8 (Pa. Sup.). An admission by the indorser of a note as to the genuineness of his signature, made to the holder after it had discounted the same, does not estop him from denying the genuineness of the alleged indorsement on a renewal note given by the maker, the indorser having been released from liability on the original note by reason of its nonprotest for nonpayment. (Ib.)
- 9 (Tenn., 1900). Where, in a suit by a bank to recover on an overdraft, the defendant alleges payment, and introduces deposit certificates, the validity of which is questioned, the defendant may introduce letters, checks, etc., showing his possession of the money alleged to have been deposited with the bank when the certificates were issued. (Cox v. Bank of Hartsville, 63 S. W., 237.)

## MISCELLANEOUS.

*When bank not liable for forgeries of officers.*

- 1 (U. S. C. C. A., 1893). A bank clerk, whose duty it was to prepare exchange for the cashier's signature, so drew a draft for \$25 to his own order that the amount could be readily altered, and, after procuring the cashier's signature by pretending that he wished to make a remittance of that amount, altered the draft so that it presented the appearance of a genuine draft for \$2,500, and thereafter indorsed it, and procured it to be discounted. *Held*, that the forgery by the clerk, and not the negligence of the bank, was the proximate cause of the loss, and the bank was not liable therefor. (Exchange National Bank of Spokane v. Bank of Little Rock, 58 Fed. Rep., 140.)
- 2 (U. S. C. C. A., 1893). The bank was not liable on the ground that the forger was its confidential employee, because in this transaction he acted as a purchaser and not as an employee, and because the purchase of the draft was complete, and he was the owner of it when the forgery was committed. (Ib.)

*When correspondent bank not liable for collection of forged draft.*

- 3 (U. S. Dist. Ct., 1895). The defendant, as collecting agent of the Bellaire Bank of Ohio, collected at the subtreasury, New York, a pension draft on which the payee's name was forged after her death. The defendant, in making the collection, indorsed the draft as collecting agent of the Bellaire Bank, as appeared by the terms of its indorsement, and on collection at once paid over the money to the principal, without notice of the forgery, before this action was commenced. *Held*, that the defendant was not liable. (The case of Onondaga Co. Sav. Bank, 12 C. C. A., 407; 64 Fed. Rep., 703, distinguished; United States v. American Exchange National Bank, 70 Fed. Rep., 232.)

*When note broker not liable as guarantor of genuineness.*

- 4 (U. S. C. C., 1896). Defendants, who were note brokers at Omaha and who had done business as such with the plaintiff bank in Iowa, sent to plaintiff by mail a list of commercial paper offered for sale,



FORGED OR ALTERED PAPER—Continued.

MISCELLANEOUS—continued.

including a note described as made by seven persons jointly to the order of one B., and indorsed by B. and another. The list sent plaintiff was headed by defendants' business card as brokers, and it contained sundry items of information about the parties to the note, purporting to be the result of inquiries as to their solvency and standing, and indicating that the same were good. Plaintiff purchased the note, and, by defendants' directions, remitted the sum paid therefor to a bank in Chicago. Defendants received from such sum only their commission for selling the note, the balance being paid to B., for whom they sold it. It afterwards proved that all the signatures on the notes, except that of B., were forgeries, and that B., although at the time of the sale of the note reported to be solvent, was in fact insolvent and wholly worthless. Plaintiff sued defendants to recover the amount paid for the note on an alleged warranty of genuineness. *Held*, that there was nothing in the note or in the circumstances of the transaction between plaintiff and defendants to justify an assumption that defendants had any interest in or ownership of the note, but, on the contrary, that the plaintiff bank must have known that it was taking title as the indorsee of B., and that defendants were acting as brokers only, and, accordingly, that defendants, having acted only as agents of a disclosed principal, could not be held personally liable for the note. (*Monticello Bank v. Bostwick et al.*, 71 Fed. Rep., 641.)

*When forgery by cashier not presumed.*

5 (N. Y.). In an action against a bank by a depositor to recover the amount of checks drawn by plaintiff, but alleged to have been paid by defendant on indorsements of the payees' names forged by plaintiff's cashier, part of whose duty was to fill in the body of checks for plaintiff to sign, pay bills, and keep the accounts, it appeared that the money on the checks in question had been obtained by plaintiff's cashier, but there was no evidence that any payees had been named in them, the canceled checks having been destroyed by the cashier. *Held*, that plaintiff could not recover, as it would not be presumed that the cashier committed forgery in addition to the embezzlement, when he could have avoided forgery by making the checks payable to "cash" or "bearer," in which event defendant would not be liable. (*National Board of Marine Underwriters v. National Bank of the Republic*, 29 N. Y. S., 698.)

*When surety not released by acceptance of forged renewal note.*

6 (Vt., 1895). A bank, which holds a note made by two persons as principal and surety, in accepting, in good faith, at maturity, a renewal note to which the name of the surety was forged by the principal, is not bound to know the handwriting of the surety, and is, hence, not guilty of negligence, entitling the surety to a discharge from liability on the original note, in failing to compare the surety's signatures on the two notes, respectively, with reference to ascertaining the genuineness of that on the renewal note. (*Lyndonville National Bank v. Fletcher*, Vt., 34 A., 38; 68 Vt., 81.)

GUARANTY.

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## GUARANTY—Continued.

*No notice of acceptance necessary when guarantor benefited.*

- 1 (U. S. C. C. A., 1893). A personal guaranty, given by stockholders and directors to another bank in consideration of loans, discounts, or other advances to be made for the repayment of any indebtedness thus created, imposes a liability on the guarantors when acted upon by the guarantee, though no notice of the acceptance of the guaranty was given, for the contract shows a personal interest of the guarantors in the advances constituting a consideration moving to them. (Doud et al. v. National Park Bank, 54 Fed. Rep., 846.)

*What claims of guarantee allowed against assignee of guarantor.*

- 2 (U. S. C. C., 1896). Receivers were appointed for an insolvent investment company, incorporated under the laws of Missouri, whose liabilities consisted mainly of guaranties, in various forms, indorsed on bonds, secured by real estate mortgages, executed by borrowers to the company, and subsequently sold and transferred by it to investors with the guaranties mentioned. *Held*, that the rights of such investors were governed by the State statute relating to assignments for benefit of creditors, which provides that the assignment shall be "for all the creditors of the assignor in proportion to their respective claims." (Rev. Stat. Mo. 1889, sec. 424); that, in the distribution of the property of such company, all claims should be allowed which, at the time of the appointment of the receivers, (1) furnished a present cause of action against the guarantor, or (2) constituted direct obligations on its part, whether due or to become due, or (3) which, though not then matured, or not constituting direct obligations, thereafter matured or would mature, or become direct obligations, before any order of distribution was made; and that all claims should be rejected (1) which arose on guaranties of collection, as distinguished from guaranties of payment, where no proceedings had been taken by the holder to collect from the maker or from the mortgaged premises, or (2) which were not matured, and in respect to which there had been no default of interest, or (3) in which by agreement between the holder and maker, without the assent of the guarantor, the time of payment of the principal obligation had been extended. (New York Security & Trust Co. et al. v. Lombard Inv. Co. of Kansas et al., 73 Fed. Rep., 537.)
- 3 (U. S. C. C., 1896). Receivers were appointed for an insolvent investment company, which had sold and transferred obligations secured by mortgage, with guaranties of payment thereof, but with a provision that, in case of default, it should have two years within which to collect and pay over the amount of the debt. *Held*, that claims arising on these guaranties were provable against the receivers where default had occurred and the two years had expired, whether these two events had occurred both before the appointment of the receivers, or one before and one after such appointment, or both after the appointment; and, further, that such claims were provable after default, although the two years should not expire before the order of distribution. (Ib.)

*When guarantee's claim on guarantor becomes direct and due.*

- 4 (U. S. C. C., 1896). A claim against a guarantor of payment matures, so as to become a direct obligation, not only on the date the guaranteed debt becomes due, but on default in payment of interest or other preliminary obligation, when, by the terms of the contract, such default is made to precipitate maturity of the debt. (New York Security & Trust Co. et al. v. Lombard Inv. Co. of Kansas et al., 73 Fed. Rep., 537.)

*Guarantor released by guarantee's want of diligence.*

- 5 (U. S. C. C., 1896). A guaranty of collection of an obligation secured by mortgage which is transferred by the guarantor is an undertaking to pay the debt on condition that the person to whom the guaranty is given shall diligently proceed against the principal debtor and the

## GUARANTY—Continued.

mortgage security, and, in default of such diligence, the guarantor is released. (New York Security & Trust Co. et al. v. Lombard Inv. Co. of Kansas et al., 73 Fed. Rep., 537.)

*Whether a guaranty of payment or collection.*

- 6 (U. S. C. C., 1896). An investment company selling and transferring an obligation secured by mortgage agreed, by indorsement thereon, "first, to guarantee the payment of the coupons attached hereto at the maturity thereof; second, to collect at its own expense, and to pay over the principal hereof at maturity, provided the same is paid by the maker; third, in event of default being made by the maker, to collect at its own expense and to pay over the principal hereof within two years from maturity of the same," with interest at 6 per cent per annum. *Held*, that this was a guaranty, not of collection merely, but of payment. (New York Security & Trust Co. et al. v. Lombard Inv. Co. of Kansas et al., 73 Fed. Rep., 537.)

*What is not a "commercial indorsement."*

- 7 (U. S. C. C., 1881). Where a promissory note is transferred, and the collection of it is guaranteed by the payee in the following form, to wit: "This note is transferred, and the collection of the same guaranteed to the holder hereof," the makers can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due and without knowledge of any infirmity in the note. (Omaha National Bank v. Walker et al., 5 Fed. Rep., 399.)

*Guaranty of gambling debt binding to innocent indorsee for value.*

- 8 (U. S. Sup. Ct., 1891). F. owed H. & Co., on account, about \$22,000. He settled this in part by a cash payment and in part by a transfer of promissory notes payable to himself, the payment of two of which, for \$5,000 each, was guaranteed by him in writing. H. & Co. transferred these notes to a bank as collateral to their own note for about \$13,000. They then became insolvent and assigned all their estate to P., as assignee, for distribution among their creditors. The bank sued F. on his guaranty. He set up in defense that his indebtedness to H. & Co. grew out of dealings in options in grain and other commodities to be settled on the basis of "differences," and that it was invalidated by the statutes of Illinois, where the transactions took place. The court held that he could not maintain the statutory defense as against a bona fide holder of the guaranteed notes, and gave judgment against him. Execution on this judgment being returned unsatisfied, a bill was filed on behalf of the bank to obtain a discovery of his property and the appointment of a receiver, to which F. and the maker of the notes, and R., with others, were made defendants. P., the assignee of H. & Co., was, on his own application, subsequently made a defendant. An injunction issued, restraining each of the defendants from disposing of any notes in his possession due to F. Subsequently to these proceedings F. assigned to R. the two notes which H. & Co. had transferred to the bank. P., as assignee of H. & Co., filed a crossbill in the equity suit, showing that the judgment in favor of the bank was in excess of the balance due the bank by H. & Co. R. filed an answer and a crossbill in that suit, setting up his claim to the said notes, and maintaining that the judgment in favor of the bank was invalid, as being in conflict with the statutes of Illinois. *Held*, (1) that the liability of F. upon the guaranty was, as between the bank and him, fixed by the judgment in the action at law; (2) that all the bank could equitably claim in this suit was the amount actually due it from H. & Co., which was considerably less than the amount of the face of the notes; (3) that the transfer and guaranty of the notes to H. & Co. were void under the Illinois statutes, and passed no title to them or their assignee; (4) that R. was the equitable owner of the notes, and was entitled to receive them on payment to the bank of the amount of the indebtedness of H. & Co. to it; (5) that the assignment to R. having been made in good faith and for a valuable consideration, he was a person

## GUARANTY—Continued.

interested in the object to be attained by the proceedings within the intent of the statute. When, by filing a replication to a plea in equity, issue is taken upon the plea, the facts, if proven, will avail the defendant only so far as in law and equity they ought to avail him. (*Pearce v. Rice*, 142 U. S., 28.)

*Scope of guaranty by indorsee of note.*

- 9 (Ala.). A written promise and guaranty of the payment of a promissory note, "with all legal or other expenses of or for collection," executed by the indorser before the maturity of the note, covers reasonable attorney's fees incurred in the collection of the debt. (*McGhee v. Importers and Traders' National Bank*, 93 Ala., 192.)
- 10 (Ala.). When a promissory note is indorsed to A. B. with the word "cashier" added, it is presumptively the property of the bank of which he is the cashier, as shown by parol evidence, and the bank may sue on it without indorsement by him and without making him a party. (*Ib.*)

IMPAIRMENT OF CAPITAL STOCK. (*See CAPITAL STOCK.*)INCREASE OF CAPITAL STOCK. (*See CAPITAL STOCK.*)INDICTMENT. (*See OFFICERS, CRIMINAL LIABILITY OF.*)

## INJUNCTION.

## CROSS REFERENCES:

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*State court may not grant injunction prior to final judgment.*

1. A State court can not issue an injunction against a national bank prior to final judgment.  
(U. S. Sup. Ct., 1888) *Pacific National Bank v. Mixter*, 124 U. S., 721;  
(U. S.) *Hower v. Weiss Malting and Elevator Co.*, 55 Fed. Rep., 356.
- 2 (Mass., 1894). State courts have no power to grant before final judgment an injunction prohibiting a national bank from disposing of securities in its possession. (*Freeman Manufacturing Company v. National Bank of Republic*, 35 N. E., 865; 160 Mass., 398.)
- 3 (Mass., 1894). The provisions of the national-bank act, forbidding such injunctions, were not repealed by Statutes of the United States, 1882, chapter 290, section 4, or Statutes of the United States, 1887, chapter 373, section 4, or Statutes of the United States, 1888, chapter 866, section 4. (*Ib.*)

*Injunction by Federal courts not prohibited.*

- 4 (U. S. C. C. A., 1893). Section 5242, Revised Statutes, providing that no injunction shall issue from a State court against a national bank before final judgment, does not deprive the Federal court of power to issue such injunction or to continue after removal of the case an injunction previously granted by a State court. *Pacific National Bank v. Mixter*, 124 U. S., 721, distinguished. (*Hower v. Weiss Malting and Elevator Co. et al.*, 55 Fed. Rep., 356.)

*Sufficiency of bill for injunction.*

- 5 (U. S. C. C., 1894). A bill which seeks to restrain the sale by a bank of property pledged as collateral security to a note discounted by it on the ground that the president of the bank secretly agreed that he would see to the payment of the note without sale of the collateral does not state a case for equitable relief, since such agreement, being against the interest of the bank, should not be enforced for the benefit of a party to it. (*Breyfogle et al. v. Walsh et al.*, 71 Fed. Rep., 898.)

INJUNCTION—Continued.

*When injunction will not be granted.*

- 6 (U. S. C. C. A., 1894). A prayer for injunction to preserve property from sale pending litigation can not be made a ground of equity jurisdiction when the property had been sold when the bill was filed, which fact complainants knew or might have known. (*Cecil National Bank v. Thurber*, 50 Fed. Rep., 913.)
- 7 (U. S. C. C., 1897). When a valid judgment has been obtained in a State court against a national bank, and the lien thereof has attached to its property before the appointment of a receiver, Revised Statutes, section 720, applies to prohibit the issue of an injunction by a Federal court, at the suit of the receiver, to restrain the enforcement of such judgment. (*Baker v. Ault et al.*, 78 Fed. Rep., 394.)

*Injunction against collection of a judgment.*

- 8 (U. S. Sup. Ct., 1901). One who has actual possession of the goods of a debtor corporation under a bill of sale, which, being executed by the president without authority, did not give a good title, can not be enjoined from selling said property under an attachment thereon, owing to the fact that he placed the property in the nominal possession of his attorney in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of the other creditors. (*Dooley v. Hadden*, *Hadden v. Dooley*, 179 U. S., 646.)
- 9 (U. S. C. C., 1890). On injunction to restrain the enforcement of a judgment on a note against the maker, it appeared that the payee, before maturity, transferred it to a bank as collateral; that the maker, in ignorance of the fact, paid it to the payee, without receiving the note, upon his representation that he had forgotten to bring it. After maturity, the bank, pursuant to an agreement with a person who knew that it was up as collateral, obtained judgment on it and assigned the judgment and all other collateral paper to him on his paying the principal debt. Among the collaterals were notes on which this person was a surety for a greater amount than the principal debt. *Held*, that equity required the bank to resort first to the other collaterals which it held, and this equity was not changed by reducing the note to judgment, and that the assignee got no greater rights than the bank had, and therefore could not collect the judgment, whether the transaction be considered as a purchase by him or as a part payment of his own obligation. (*Barhorst et ux. v. Armstrong et al.*, 42 Fed. Rep., 2.)

*Liability on bond when suit wrongly brought.*

- 10 (Iowa, 1892). A decree dismissing an injunction because wrongfully sued out is conclusive as to the wrongful suing out when offered in evidence in an action for damages against the surety on a bond, the undertaking of which is that the principal will pay all damages which may be adjudged by reason of the injunction, although the surety may not have been a party to the injunction and there may have been no damages adjudged against the principal. (*Bunt v. Rheum*, 3 N. W., 667; 52 Iowa, 619, distinguished. *Shenandoah National Bank v. Read*, 53 N. W., 96; 86 Iowa, 136.)

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## IN GENERAL.

*National banks not under jurisdiction of bankruptcy courts.*

- 1 (U. S. Dist. Ct., 1873). National banks are not subject to the bankrupt act, and bankruptcy courts have no jurisdiction as against such associations. If insolvent they can be wound up only in the mode provided by the national banking act. (In re Manufacturers' National Bank, 5 Bissell, 499; 1 N. B. C., 192.)

## EVIDENCE OF INSOLVENCY.

*Evidence of insolvency.*

- 1 (Ill.). A return of nulla bona upon an execution issued against the property of a national bank is proof of its insolvency. (Wheelock v. Kost, 77 Ill., 296.)
- 2 (N. Y. Sup. Ct., 1883). The defendant, a national bank at Boston, Mass., on November 18, 1881, closed its doors, and was put in charge of a Government bank examiner, and thus continued until March 14, 1882, when the Comptroller allowed it to resume. It transacted business until May 22, 1882, when it was placed in the hands of a receiver. An attachment was issued in this action November 19, 1881, against defendant's property in this State. At that time its assets would have paid its debts and liabilities, exclusive of its capital, but it had refused to pay various legal obligations then due. *Held*, that defendant had committed acts of insolvency, within United States Revised Statutes, section 5242, and the attachment should be vacated. (Market Nat. Bank of New York v. Pacific Nat. Bank of Boston, 3 N. B. C., 672; 30 Hun., 50.)

*Creditor's suit for receiver, allegations.*

- 3 (U. S. C. C., 1875). A bill in equity by a judgment creditor of a national bank alleged that the judgment was for moneys deposited with the bank; that the bank had gone into voluntary liquidation; that it had withdrawn its bonds on deposit with the Treasurer of the United States; that the officers had fraudulently applied the funds of the

## INSOLVENCY AND RECEIVERS—Continued.

## EVIDENCE OF INSOLVENCY—continued.

bank to the payment of other persons than the complainant, and that there was no property subject to seizure on execution. *Held*, a proper case for the appointment of a receiver by the court. (*Irons, Exr., v. The Manufacturers' Nat. Bank*, 1 N. B. C., 203; 6 Biss., 301.)

## POWER TO APPOINT RECEIVER.

*Comptroller may appoint receiver before adjudication of insolvency.*

- 1 (U. S. Sup. Ct., 1897). The Comptroller may appoint a receiver for an insolvent national bank, or make a ratable assessment upon the stockholders, without a prior judicial determination of the necessity for a receiver or of the existence of the bank's liabilities. (*Bushnell v. Leland*, 17 S. Ct., 209; 164 U. S., 684.)

*Comptroller determines when receiver should be appointed.*

- 2 (U. S. C. C., 1893). The power vested in the Comptroller of the Currency by act June 30, 1876 (19 Stat. L., 63), authorizing him, whenever he becomes satisfied of the insolvency of a national bank, to appoint a receiver, is discretionary; and his decision as to such insolvency, for the purpose of such an appointment, is final, and not reviewable by the court. (*Washington National Bank of Tacoma v. Eckels et al.*, 57 Fed. Rep., 870.)
- 3 (U. S. C. C., 1893). The right to put a national bank in voluntary liquidation, given to stockholders by Revised Statutes, section 5220, does not affect the right of the Comptroller to appoint a receiver under the act of June 20, 1876. (*Ib.*)
- 4 (U. S. C. C., 1893). Nor does the act of 1876, providing that after the receiver has had charge of the bank long enough to pay all its debts, the stockholders may select an agent to take charge of such assets as remain, limit the power of the Comptroller to take action before the bank ceases to do a banking business. (*Ib.*)
- 5 (U. S. C. C., 1893). Section 1 of the act of 1876, authorizing the appointment of a receiver by the Comptroller to "close up" a national banking association, contemplates the liquidation and final winding up of the business of the bank, not the mere closing of the bank, and does not limit the power of the Comptroller to take action before the bank has closed its doors. (*Ib.*)
- 6 (N. Y.). It is not necessary that the facts upon which the Comptroller bases his action in appointing a receiver should be established by what is *competent legal evidence*; but he is left to be satisfied as best he can be, under the peculiar circumstances of each case, of the facts and the necessity for the exercise of his authority. (*Platt v. Beebe*, 57 N. Y., 339.)

*Debtors can not inquire into validity of receivers' appointment.*

- 7 (U. S. Sup. Ct., 1874.) The debtors of a national bank when sued by the receivers of the bank can not inquire into the validity of his appointment. (*Cadle v. Baker*, 1 N. B. C., 108; 20 Wall., 650.)

*Court of equity as well as Comptroller may appoint receiver.*

8. The power of the Comptroller to appoint a receiver is not exclusive; it does not oust the courts of equity of their authority in the matter; and therefore a court of competent jurisdiction may place the bank in the hands of a receiver in cases where, according to the rules of equity, it may pursue such a course with regard to insolvent corporations generally.

(U. S. C. C., 1875) *Irons Executor et al. v. Manufacturers' National Bank*, 6 Biss., 301; 1 N. B. C., 203;

(U. S. C. C.) *Wright v. Merchants' National Bank*, 1 Flippin, 561.

*When equity allows injunction and receiver.*

- 9 (Ga., 1879). Where judgment has been rendered in a State court against a national bank, and upon the execution issuing thereon a return of



## INSOLVENCY AND RECEIVERS—Continued.

## POWER TO APPOINT RECEIVER—continued.

nulla bona has been made by the sheriff of the county where the bank is located, and the bank has ceased to discharge its functions as a fiscal agent of the United States, and is disposing of its assets which can not be reached by levy and sale under the common-law execution among its stockholders, thereby endangering the safety of those assets and the judgment debt of the creditor, equity will relieve by the grant of injunction and the appointment of a receiver. (*Merchants and Planters' National Bank v. Trustees of Masonic Hall*, 2 N. B. C., 220; 63 Ga., 549.)

*Receiver may be removed by Comptroller.*

- 10 (U. S. Sup. Ct., 1869). The receiver of a national bank is the instrument of the Comptroller, and may be removed by him. (*Kennedy v. Gibson*, 8 Wall., 498.)

## PRESUMPTION AS TO REGULARITY OF APPOINTMENT OF RECEIVER.

- 1 (U. S. C. C., 1883). Appointments of receivers of national banks, made by the Comptroller of the Currency as provided by law, are to be presumed to be made with the concurrence or approval of the Secretary of the Treasury, and are made by the head of a Department within the meaning of section 2 of Article II of the Constitution of the United States. (*Price, receiver, v. Abbott*; *Same v. Colson*, 17 Fed. Rep., 506.)
- 2 (Nebr., 1898). When a court of competent jurisdiction has appointed a receiver in an action where such appointment is authorized, the authority of such receiver is not open to collateral attack. (*Andrews v. Steele City Bank et al.*, 1 Banking Cases, 76; 57 Nebr., 173.)

## EFFECT OF APPOINTMENT OF RECEIVER.

*Appointment of receiver does not dissolve corporate existence.*

- 1 (U. S. Sup. Ct., 1871). A national bank does not lose its corporate existence by mere default in paying its notes and the appointment of a receiver. (*First National Bank of Bethel v. National Pahquique Bank*, 14 Wall., 382.)
- 2 (U. S. Sup. Ct., 1871). Such association may be sued, though a receiver has been appointed and is administering its concerns. (*Ib.*)
- 3 (U. S. Sup. Ct., 1896). The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a receiver, and there is nothing in the statute relating to national banks which takes them out of the operation of this general rule. (*Chemical National Bank v. Hartford Deposit Co.*, 161 U. S., 1.)
4. The appointment of a receiver does not dissolve corporation.  
(U. S. Sup. Ct., 1881) *National Bank v. Insurance Co.*, 104 U. S., 51;  
(Minn. Sup., 1889) *Merchants' National Bank v. Gaslin*, 41 Minn., 552;  
(S. C.) *Abrens v. State*, 3 S. C., 401.
- 5 (Fla. Sup., 1902). The legal existence of a national bank is not ended by its insolvency and the appointment of a receiver therefor by the Comptroller of the Currency, but it still continues as an entity capable of suing and being sued notwithstanding such appointment. (*Camp et al. v. Nat. Bank of Ocala*, 33 So. Rep., 241; 5 B. C., 202.)
- 6 (Md. App., 1877). An action may be prosecuted against a national bank, although it has resolved to go into liquidation and has provided for the redemption of its circulating notes. (*Ordway v. The Central National Bank of Baltimore*, 1 N. B. C., 559; 47 Md. App., 217.)
- 7 (N. Y. Sup., 1874). An action may be brought against a national bank notwithstanding a receiver of it has been appointed. (*Security Bank of New York v. Nat. Bank of the Commonwealth*, 1 N. B. C.,

## INSOLVENCY AND RECEIVERS—Continued.

## EFFECT OF APPOINTMENT OF RECEIVER—continued.

774; 4 Thompson & Cook, 518; *Green v. The Wallkill Nat. Bank*, 1 N. B. C., 786; 7 Hun, 63.)

*Limitations.*

- 8 (U. S. C. C. A., 1896). One appointed merely temporary receiver of a national bank on account of a suspension of payments, arising from defalcations of certain officers, is not necessarily such a representative of the bank that limitations provided in an insurance policy, intended to indemnify the bank against such defalcations, will commence to run when the receiver discovers the frauds. (*Jackson v. Fidelity and Casualty Co.*, C. C. A., 75 Fed. Rep., 359.)

## WHOM RECEIVER REPRESENTS.

*Whom receiver represents when appointed by Comptroller.*

- 1 (U. S. Sup. Ct., 1870). He represents the bank, its stockholders, and its creditors, but he does not in any sense represent the Government. (*Case v. Terrell*, 11 Wall., 199.)
- 2 (U. S. Sup. Ct., 1897). A receiver of an insolvent national bank, appointed by the Comptroller of the Currency, is the agent of the United States, and not an agent or officer of any court; nor does he, by filing a petition in a Federal court, under Revised Statutes, section 5234, for leave to sell property of the bank, or to sell or compound bad or doubtful debts, place the assets of the bank in the custody of the court, in the sense in which it has the custody of property in the hands of a receiver appointed by itself. (*Ex parte Chetwood*, 165 U. S., 443.)

*Receiver under Comptroller's direction.*

- 3 (U. S. Sup. Ct., 1872). The clause of section 50, act of 1864, which prescribes that the receiver shall be "under the direction of the Comptroller," means only that he shall be subject to the Comptroller's direction, not that he shall not act without orders. He may bring suit to collect assets without having been instructed to do so by the Comptroller. (*National Bank of the Metropolis v. Kennedy*, 84 U. S. (17 Wall.), 19.)

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS.

*What transfers assets to receiver.*

- 1 (U. S. Sup. Ct., 1892). The closing of a national bank by order of the examiner, the appointment of a receiver, and its dissolution by decree of a circuit court necessarily transfer the assets of the bank to the receiver. (*Scott v. Armstrong*, 146 U. S., 499.)

*Assets as trust fund.*

2. The receiver takes the assets of an insolvent national bank in trust for its creditors.  
(U. S. Sup. Ct., 1892) *Scott v. Armstrong*, 146 U. S., 499;  
(U. S. C. C., 1886) *Riddle v. First National Bank of Butler, Pa.*, 27 Fed. Rep., 503.

*Receiver holds assets with same rights and liabilities as bank.*

- 3 (U. S. Sup. Ct., 1892). The receiver in such case takes the assets in trust for creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation. (*Scott v. Armstrong*, 146 U. S., 499.)
- 4 (U. S. C. C., 1889). The receiver stands in the shoes of the bank and can assert no rights against the subscribers which the bank could not have asserted. (*Winters v. Armstrong*; *Armstrong v. Stanage*; *Same v. Wood*, 37 Fed. Rep., 508.)

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

- 5 (U. S. C. C., 1901). The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders, or creditors. He is not entitled to have a contract made by the bank, and which has been executed, set aside on the ground merely that it was ultra vires. (*Brown v. Schleier et al.*, 112 Fed. Rep., 577.)
- 6 (U. S. C. C., 1895). A receiver of a national bank holds its negotiable notes subject to the same defenses that applied to the bank itself. (*Hatch v. Johnson Loan and Trust Co. et al.*, 79 Fed. Rep., 828.)

*Who chargeable with expenses of receivership.*

- 7 (U. S. Sup. Ct., 1887). The expenses of receivership of a national bank appointed in a creditor's suit contesting a voluntary liquidation of the bank, can not be charged on stockholders as part of their statutory liability, but must come from the creditors at whose instance the receiver was appointed. (*Richmond v. Irons*, 121 U. S., 27.)

*Receiver's rejection of claim not final.*

- 8 (U. S. Sup. Ct., 1871). The decision of a receiver rejecting a claim is not final. The claimant still has the right to sue. (*First Natl. Bank of Bethel v. Natl. Pahquioque Bank*, 14 Wall., 383.)

*Receiver has same status and powers as bank.*

- 9 (U. S. C. C., 1895). The receiver of a national bank holds its negotiable notes subject to the same defenses that applied to the bank itself. (*Hatch v. Johnson Loan and Trust Co. et al.*, 79 Fed. Rep., 828.)

*When bank or receiver not a bona fide holder.*

- 10 (U. S. C. C. A., 1894). Where a bank, through its president, whose authority to act for it in such matters was shown, and who gave a receipt, signed by himself as president, stated that the note was for the use of and was to be paid by the bank, borrowed a note for its own use on a consideration which failed, which note was subsequently renewed by the makers, neither the bank nor its receivers is a bona fide holder of the note as against the makers, though the "offering book" of the bank had an entry indicating that the original note had been discounted as on the offer of the makers, it also appearing that the president had ordered the proceeds of discount carried to an individual credit, but had withdrawn none of the money from the bank. (*Fisher v. Simons*, 64 Fed. Rep., 311.)

*Comptroller may not order receiver's suit compounded.*

- 11 (U. S. C. C., 1881). Suits brought by a receiver can not be settled or compounded upon an order of the Comptroller; this can be done only with the authority of court. (*Case v. Small*, 2 Woods, 78; 10 Fed. Rep., 722.)

*Debt not "bad or doubtful" may not be compounded.*

- 12 (U. S. C. C., 1879). A court has no power, under section 5324, Revised Statutes, to order the receiver of a national bank to compound debts which are not "bad or doubtful;" and a composition under such an order of debts not "bad or doubtful," as the debt of a shareholder arising on his subscription to the stock, is ineffectual. (*Price, receiver of Venango National Bank, v. Yates*, 19 Alb. L. J., 295; 2 N. B. C., 204.)

*When court may order doubtful debt compounded.*

- 13 (U. S. Dist. Ct., 1867). A district court of the United States may order the receiver of a national bank to compromise doubtful debts under section 50 of the national banking act (13 Stat. L., 115), which authorizes receivers to compromise such debts "on the order of a court of record of competent jurisdiction." (*Petition of Platt*, 1 Benedict, 534; 1 N. B. C., 181.)

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

*Sale by receiver under section 5234 a judicial sale.*

- 14 (U. S. Dist. Ct., 1880). A sale by a receiver of the property of a national bank, under an order of court, in accordance with the provisions of section 5234, Revised Statutes, constitutes a judicial sale. (In re Third National Bank, 4 Fed. Rep., 775.)
- 15 (U. S. Dist. Ct., 1880). Although the rights of a purchaser at a judicial sale are subject to the action of the court, yet such action must depend upon the general principles and usages of law. (Ib.)
- 16 (U. S. Dist. Ct., 1880). *Held*, therefore, where a receiver has sold the property of a national bank, under an order of court, in accordance with section 5234, Revised Statutes, that such sale would not therefore be set aside before confirmation upon a subsequent offer of an advance bid of \$5,000 or \$6,000, where a former sale of the same property had been set aside for inadequacy of price. (Ib.)

*Receiver may at any time dismiss attorney; attorney's fees.*

- 17 (U. S. Dist. Ct., 1892). The receiver of an insolvent bank may at any time dismiss an attorney employed by him, regularly or otherwise, to prosecute claims of the bank, and employ another in his place, whom the court will, by order, substitute in the place of the dismissed attorney, except as to such cases as the latter may have commenced and finished. (In re Herman, 50 Fed. Rep., 517.)
- 18 (U. S. Dist. Ct., 1892). A contract having been entered into between the receiver and the attorney that the latter should receive the attorney's fees provided for in the notes he was employed to collect, the court will not direct the substitution of another attorney in unfinished cases until the receiver deposits the amount of the attorney's fees reserved in the notes as a security to the dismissed attorney for such services as he may have rendered. (Ib.)
- 19 (U. S. C. C., 1897). When, at the time of the appointment of a receiver of a bank, suits are pending on notes belonging to the bank, with counsel employed and necessary, the reasonable fees of such counsel are chargeable against the assets. (Sowles v. National Union Bank of Swanton, 82 Fed. Rep., 139.)
- 20 (U. S. C. C., 1897). Counsel fees will not be allowed a receiver for services rendered in conducting the suit, in which he was appointed; nor for services on a hearing before a master in behalf of a claim which included a charge for fees paid to the same counsel; nor for services before the master on the hearing upon the receiver's account, where the principal contest was over the charges of such counsel to the receiver; nor for services in obtaining the appointment of a former receiver who has been superseded. (Ib.)

*Title to bonds deposited to secure circulation; actions.*

- 21 (U. S. C. C., 1871). The plaintiff, a citizen of New York, claiming title by assignment to the bonds deposited with the Treasurer of the United States to secure the circulation of a national bank, filed a bill setting forth that the Comptroller of the Currency and the Treasurer refused to recognize his right to the bonds or their proceeds; that the Comptroller had appointed one K., a citizen of New York, receiver of the said bank, and intended to sell the said bonds and to pay the proceeds, after redeeming the circulation of the bank, to the general creditors of the bank, or to K. as such receiver, and that K. claimed as such receiver an interest adverse to the plaintiff in said bonds. The bill made the Comptroller, the Treasurer, and K. parties defendant, and prayed a decree establishing the plaintiff's title and requiring the Comptroller and the Treasurer to deliver to the plaintiff the surplus of the bonds after redeeming the notes of the bank, and annulling the appointment of K. as receiver. K. demurred to the bill for lack of equity. *Held*, that the demurrer must be sustained. (Van Antwerp v. Hullburd, 8 Blatchford, 282; 1 N. B. C., 219.)

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

- 22 (U. S. C. C., 1871). Per Woodruff, J. (1) The plaintiff could not question the validity of K.'s appointment as receiver; (2) that, as the court could not grant the relief as to the Comptroller and Treasurer, it could not as to K.; (3) that, as under the national banking act the proceeds of the bonds could never come into the possession of K., he had no concern in the suit; (4) that the allegation that plaintiff was informed and believed that K. claimed an interest in the bonds adverse to the plaintiff was not sufficient to sustain the bill. (Ib.)
- 23 (U. S. C. C., 1871). Per Hall, J. The residuary interest of the bank in the bonds was a part of the assets of the bank, to which K., as receiver, was entitled, unless the plaintiff's claim thereto was good, and that therefore the bill presented a question of property between plaintiff and K., but that, as plaintiff and K. were residents of the same State, the circuit court had not jurisdiction. (Ib.)

*Receiver not liable for money paid to Comptroller.*

- 24 (U. S. Sup. Ct., 1887). Receiver of national bank appointed by Comptroller of the Currency is not accountable in equity to owner of real estate for rents thereof received by him and paid into United States Treasury, subject to disposition of Comptroller, under Revised Statutes, section 5234. (Hitz v. Jenks, 123 U. S., 297.)
- 25 (U. S. C. C. A., 1899). A decree which commands the receiver of an insolvent national bank to pay over a large sum of money within ten days, where, as a matter of fact, and in accordance with law, the funds are in the custody of the Comptroller of the Currency, unduly limits the time for satisfying the decree, and might result in the receiver being in contempt for not paying over moneys which are not within his control. (Richardson v. Louisville Banking Co., 94 Fed. Rep., 442.)

*Receiver's liability for taxes on assets.*

- 26 (U. S. C. C., 1892). Public Statutes of Massachusetts, chapter 13, sections 8-10, provide that shares of stock in all banks, State and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. *Held*, that no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared; for, there being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank, which belong to its creditors, and thereby violate the rule that a State can not tax the capital stock of a national bank. (City of Boston v. Beal, 51 Fed. Rep., 306.)
- 27 (U. S. C. C., 1897). A receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank. (Brown v. French, 80 Fed. Rep., 166.)
- 28 (U. S. C. C. A., 1898). Where a bank is insolvent and has passed into the hands of a receiver, a tax assessed against the shares of the bank can not be collected from the receiver or from the assets in his hands. (Stapylton v. Thaggard, 1 Banking Cases, 320; 91 Fed. Rep., 93.)
- 29 (Mass., 1901). Acts 1882, chapter 165, authorizing the taxing of property held by assignees in insolvency, bankruptcy, or for the benefit of creditors under a voluntary assignment, can not authorize the taxation of a receiver for the personal property held by him. (City Nat. Bank v. Charles Baker Co., 4 Banking Cases, 127; 61 N. E. Rep., 223; 180 Mass., 40.)
- 30 (Mass., 1901). In the absence of an assignment executed for the purpose of making a receiver the owner of personal property in his hands, or of any statute giving such effect to his appointment, the receiver can not be regarded as owner so as to render him taxable for the property.

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

Where a receiver deposits in a bank money acquired by a sale of personality in his hands, the corporation of which he is receiver remains the legal owner of the funds, and hence the receiver is not liable to be taxed as the owner of the debt created by the deposit. (Ib.)

*Taxation, bank's personality in hands of receiver exempt.*

31 (U. S. Sup. Ct., 1881). The personal property of an insolvent bank in hands of a receiver is exempt from State taxation. (*Rosenblatt v. Johnston*, 104 U. S., 462.)

32 (Colo. Sup., 1879). A tax levied on the property of a national bank subsequent to its insolvency is subordinate to the rights of a receiver appointed after such levy. (*Woodward v. Ellsworth*. 2 N. B. C., 216; 4 Colo., 580.)

*Receiver's duty as to bank's executory contracts.*

33 (U. S. C. C. A., 1896). When a court of equity takes control, through a receiver, of a trust estate, in proceedings based on the insolvency and fraudulent management thereof, it is not more bound than in the case of proceedings for the foreclosure of liens to carry out all the contracts of the insolvents. No executory contract is binding on the receiver until adopted by him, and it is the duty of the receiver to refuse to adopt such a contract which would prove so burdensome as to imperil the fund. (*Whitney et al. v. General Electric Co. of New York et al.*, 74 Fed. Rep., 664.)

*Statute of limitations does not affect assets in receiver's hands.*

34 (U. S. C. C., 1886). Upon the appointment of a receiver, all the assets of the association become, in his hands, a trust fund, which the statute of limitations does not touch or affect. (*Riddle v. First National Bank of Butler, Pa.*, 27 Fed. Rep., 503.)

*Interest on claims due insolvent banks.*

35 (U. S. C. C., 1890). Insolvent debtors of an insolvent national bank assign, giving preferences in favor of the bank. *Quære*, whether the debt preferred shall carry interest. *Held*, that where there is nothing in the language of the assignment, or in the circumstances under which the debt was created, to negative the presumption that the debt should bear interest, and nothing in the conduct of the receiver of the national bank to estop him from claiming interest, in such a case interest must be paid. (*Bain et al. v. Peters*, 44 Fed. Rep., 307. Affirmed by U. S. Sup. Ct., *Peters v. Bain*, 133 U. S., 670.)

*Receiver not vested with visitatorial powers over national banks.*

36 (U. S. C. C. A., 1902). A receiver of a national bank, appointed by the Comptroller of the Currency, is not vested, by virtue of his appointment, with all of those visitatorial powers over national banks which the United States, acting in its sovereign capacity, may exercise. (*Brown v. Schleier et al.*, 118 Fed. Rep., 981.)

*Receiver can not maintain suit on fully executed contract.*

37 (U. S. C. C. A., 1902). A receiver of a national bank can not maintain a suit against a third party based upon the alleged invalidity, as *ultra vires*, of a contract made by the bank which was fully executed ten years prior to his appointment, and to which no objection was made at the time, either by the United States or by any stockholder. (Ib.)

*Receiver of national bank—Dealings with pledged securities.*

38 (U. S. C. C. A., 1902). An instrument assigning certain shares of stock and bonds to the receiver of a national bank to secure a debt from the assignor of the bank, subject to certain prior pledges of a portion of the stock and bonds, in terms vested the receiver with "the rights of an owner, so far as regards sale, disposition, and management." *Held*, that dealings with the stock and bonds by the receiver

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

after the assignor's death, with the approval of the Comptroller, by which a forced sale was prevented by prior pledgees, and all parties in interest were benefited, could not be attacked in equity by the assignor's administrator because he did not assent to the same. (*McCartney et al. v. Earle*, 115 Fed. Rep., 462.)

*Application of deposit on claim.*

- 39 (Ala., 1898). When a national bank is insolvent, general deposits can not be applied to the payment of a note payable at such bank, although the bank is open when the depositor orders such application of his deposits and he is in ignorance of such insolvency. (*First National Bank of Cambridge, Ill., v. Hall et al.*, 1 Banking Cases, 198; 119 Ala., 64.)
- 40 (N. Dak., 1900). Where at the time a national bank was placed in the hands of a receiver another corporation had on deposit therein a certain sum of money and was also liable to the bank on distinct contracts, such other corporation had the right to direct the application of the money so on deposit. (*Tourtlot v. Whitehead*, 3 Banking Cases, 15.)

*Receiver's appointment terminates officer's authority.*

- 41 (Ind. Sup., 1896). Where a corporation borrowed money and directed its officers to pay over the same to another creditor, the authority of the officers to pay over said money terminated by the appointment of a receiver for said corporation. (*First National Bank of Crawfordsville v. Dovetail Body and Gear Company*, 42 N. E., 924; 143 Ind., 534.)

*Receiver may sell property only on order of court.*

- 42 (Kans., 1882). The receiver can not sell the real or personal property of the bank without an order from a court of competent jurisdiction. (*Ellis v. Little*, 27 Kans., 707; 41 Am. Rep., 434; 3 N. B. C., 446.)
- 43 (Kans., 1882). Nor can he sell upon the terms in conflict with the order. (Ib.)

*Purchaser from receiver charged with knowledge of his authority.*

- 44 (Kans., 1882). As the power of a receiver of a national bank appointed by the Comptroller is limited, a person dealing with him in his official capacity is bound, as a matter of law, to have knowledge of his authority to act, and if contracts and agreements are entered into with the receiver in excess of his authority as conferred by law, the parties contract at their own peril, and the estate of the bank can not be charged for the default or inability of a receiver acting outside of his functions as receiver and beyond the duties which it involves. (*Ellis v. Little*, 27 Kans., 707.)
- 45 (Kans., 1882). The receiver can not charge the estate of the bank by an executory contract, unless authorized so to do by the provisions of the national banking law and the order of a court of competent jurisdiction obtained upon the terms of said law. (Ib.)

*Receiver, when ordered to sell assets, may not trade.*

- 46 (Kans., 1882). The receiver of a national bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter, or trade the assets. (Ib.)

*When money of individual is deposited with that of receiver.*

- 47 (Md.). Where a receiver of a corporation deposits to his credit, as receiver, money belonging to an individual, the corporation is under obligation to repay such person, and therefore is not prejudiced by the giving of a check by the receiver to such individual in payment of the obligation. (*Eccles v. Drovers and Mechanics' National Bank*, 29 A., 963; 79 Md., 332.)

## INSOLVENCY AND RECEIVERS—Continued.

## POWERS OF RECEIVER TO DISPOSE OF ASSETS AND COMPOUND CLAIMS—continued.

*Receiver may collect stock subscription.*

- 48 (Miss., 1897). A stockholder in a national bank is liable to the receiver thereof on a note given to the bank for capital stock. (*Hepburn v. Kincannon*, 21 So. Rep., 569; 74 Miss., 691.)

*Authority of State court over receiver appointed by Comptroller.*

- 49 (N. Y. Sup., 1876). A State court can not order a receiver for a national bank, appointed by the Comptroller of the Currency, to pay a judgment recovered against the bank before the appointment of the receiver. (*Ocean National Bank v. Carll*, 7 Hun, 237; 1 N. B. C., 792.)

*Replevin against receiver.*

- 50 (N. Y. App., 1886). A party claiming title to property in the possession of a receiver of an insolvent national bank, which came to his possession with other property belonging to the bank, may, upon his refusal to deliver the same, maintain an action of replevin therefor. (*Corn Exchange Bank v. Blye*, 101 N. Y., 303; 3 N. B. C., 634.)

- 51 (N. Y. App., 1886). Such a proceeding is not prohibited by section 5242, Revised Statutes. (Ib.)

*Receiver may extend time of payment.*

- 52 (N. Dak., 1889). The receiver of a national bank has authority, on sufficient consideration, to extend the time of payment of a debt owing to the bank, where he can by so doing, in his opinion, strengthen the security he holds for the payment of such debt. (*People's State Bank v. Francis*, 79 N. W. Rep., 853; 8 N. Dak., 369.)

*Receiver chargeable with notice same as bank.*

- 53 (N. Dak., 1889). Where a receiver is given charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of the assets. (Ib.)

*How property in receiver's hands may be sold.*

- 54 (Tex.). Though a court administering property through a receiver may resort to the statute requiring the sale of property by the sheriff under process of execution or order of sale, such statute is not exclusive, and the court may, in its discretion, order a sale by the receiver or commissioners. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.*, Tex. Civ. App., 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchants' National Bank*, ib.)

## PARTIES WHERE RECEIVER HAS BEEN APPOINTED.

*When receiver not necessarily a party.*

- 1 (U. S. Sup. Ct., 1871). A creditor of a national bank can maintain a suit against the bank in State court, although receiver has been appointed and is administering its concerns. (*First Nat. Bank of Bethel v. National Pahquioque Bank*, 14 Wall., 384.)

*Suit to have fund applied to claim, parties.*

- 2 (U. S. C. C., 1891). In an action to secure the application of part of the funds in the hands of a receiver of a national bank, appointed by the Comptroller of the Currency, in satisfaction of plaintiff's claim against the insolvent bank for money received by it as collecting agent, the bank is only a nominal party, for the receiver is the one to be held accountable for any unauthorized disposition of the moneys sued for. (*Grant v. Spokane National Bank et al.*, 47 Fed. Rep., 673.)

*Suit to enforce claim against bank.*

- 3 (U. S. C. C. A., 1897). While the receiver of an insolvent national bank may interpose and become a party to a suit to enforce a claim against



## INSOLVENCY AND RECEIVERS—Continued.

## PARTIES WHERE RECEIVER HAS BEEN APPOINTED—continued.

the bank, he is not a necessary party to such a suit, and a judgment rendered against the bank by a court of competent jurisdiction, in a suit to which he is not a party, is binding upon the receiver, in the absence of fraud or collusion. (*Denton v. Baker*, 79 Fed. Rep., 189.)

- 4 (U. S. C. C. A., 1897). The holder of a judgment against an insolvent national bank, recovered upon a claim rejected by its receiver, has an adequate remedy by an action at law against the receiver, by the judgment in which the latter may be directed to recognize the claim, and he can not resort to equity to compel the allowance of the claim by the receiver, or enjoin its rejection. (*Ib.*)

*When receiver may become party to suit in State court.*

- 5 (U. S. C. C. A., 1899). Though not a party to a suit against the bank in a State court, the receiver of a national bank may appear in that court and contest the validity of the judgment. (*Denton v. Baker*, 93 Fed. Rep., 46.)
- 6 (U. S. C. C. A., 1899). A judgment was fraudulently obtained in a State court against a national bank without making a receiver thereof a party. The receiver learned of it a few days later, but took no action in the State court to contest the judgment for nearly two years, the time expiring in the meanwhile within which he might move that court to vacate the judgment for fraud, and his application therein was denied. *Held*, that he was guilty of laches, and equity would not annul the judgment. (*Ib.*)

## ACTIONS.

## JURISDICTION OF ACTIONS BY AND AGAINST RECEIVERS.

*In receiver's suits for assets regardless of citizenship of parties.*

- 1 (U. S. C. C., 1895). A Federal court has jurisdiction of an action brought by the receivers of an insolvent national bank in the name of the bank, to realize its assets, irrespective of the citizenship of the parties. (*Linn County National Bank v. Crawford* (C. C.), 69 Fed. Rep., 532.)
- 2 (U. S. C. C., 1904). An action by a receiver of a national bank to collect a debt due the bank is one brought under authority of Revised Statutes, section 5234, and is within the jurisdiction of a Federal court regardless of the amount in controversy. (*Schofield v. Palmer*, 134 Fed. Rep., 753.)
- 3 (U. S. C. C. A., 1896). The United States circuit court has jurisdiction of a suit brought by the statutory receiver of a national bank, without reference to the citizenship of the parties. (*Short et al. v. Hepburn*, 75 Fed. Rep., 113.)
- 4 (U. S. C. C. A., 1897). Under the provision in the judiciary act of 1887-88 that "the provisions of this section" shall not affect the jurisdiction of the circuit courts in cases for "winding up the affairs" of any national bank, the circuit courts have at least concurrent jurisdiction (whether exclusive or not is not decided) with the State courts in cases of that kind, without regard to the citizenship of the parties. (*Lake National Bank v. Wolfeborough Savings Bank et al.*, 78 Fed. Rep., 517.)
- 5 (U. S. C. C. A., 1897). A State court appointed a receiver of a national bank, but he never obtained possession of its property. The original complainant discontinued, and the defendant filed a motion to dismiss, but no formal order of dismissal was entered. *Held*, that the pendency of the suit in that condition was no bar to a subsequent suit between the same parties in a Federal court for the appointment of a receiver, etc. (*Ib.*)
- 6 (U. S. C. C., 1888). Act Congress, March 3, 1887, section 4, declares that national banking associations are, for the purpose of all actions by or

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## JURISDICTION OF ACTIONS BY AND AGAINST RECEIVERS—continued.

against them, at law or in equity, to be deemed citizens of the States in which they are respectively located, but "the provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." *Held*, that a receiver of a national bank may still maintain a suit in the United States circuit court, without reference to the citizenship of the parties or the amount involved, to recover a claim due the bank. (*Armstrong v. Trautman et al.*, 36 Fed. Rep., 275.)

- 7 (U. S. C. C. A., 1899). A receiver for an insolvent national bank, appointed by the Comptroller of the Currency, may sue in a Federal court, without regard to his citizenship or the amount in controversy. (*Myers v. Hettinger*, 94 Fed. Rep., 370.)
- 8 (U. S. C. C. A., 1902). A suit brought by the receiver of a national bank, by direction of the Comptroller of the Currency, to enforce a liability due to the bank, and to secure a sale, under the order of the court, of pledged securities, constituting a considerable part of its assets, is one for winding up the affairs of the bank, within the meaning of the proviso to section 4 of the Federal judiciary act of 1888, and within the jurisdiction of a circuit court of the United States, without regard to the citizenship of the parties. (*McCartney et al. v. Earle*, 115 Fed. Rep., 462.)
- 9 (U. S. C. C., 1895). The F. National Bank pledged to the U. Bank, as collateral for a loan, a draft which had previously been transferred to the F. Bank by indorsement. The F. Bank afterwards became insolvent, and the Comptroller appointed a receiver, to whom the U. Bank indorsed the draft "For collection and in trust for the U. Bank." *Held*, that the receiver might show, by evidence outside of the written contract, that the draft was really an asset of the F. Bank, upon which his right of action was derived from his appointment and the laws of the United States, and hence was within the jurisdiction of the Federal courts, although his indorser, the U. Bank, and the drawer and acceptor of the draft were citizens of the same State. (*Thompson v. Pool et al.*, 70 Fed. Rep., 725.)

*Residence of a receiver does not affect jurisdiction.*

- 10 (U. S. Sup. Ct., 1899). Where the action is against one of the defendants as the receiver of a national bank appointed by the Comptroller of the Currency, it is against a Federal officer, and one under the laws of the United States, and Federal jurisdiction can not depend upon diversity of citizenship. (*Auten v. United States Nat. Bank of New York*, 1 Banking Cases, 416; 174 U. S., 125.)
- 11 (U. S. C. C., 1892). The Federal courts have jurisdiction of suits by receivers of national banks to collect the assets thereof without regard to the citizenship of the plaintiff. (*Fisher v. Yoder*, 53 Fed. Rep., 565.)
- 12 (U. S. Dist. Ct.). A receiver, when appointed by the Comptroller, with the concurrence of the Secretary, is an officer of the United States. (*Stanton v. Wilkeson*, 8 Ben., 357.)

*Question as to paying savings bank in full a Federal question.*

- 13 (U. S. C. C., 1894). The question whether a savings bank should be paid in full by an insolvent national bank, pursuant to the State law (Laws N. Y., 1882, chap. 409, sec. 282; *Bank v. Davis*, 26 N. Y. Supp., 200; 73 Hun, 357), or pro rata, as provided by the Revised Statutes, sections 5236, 5242. *Held*, upon a motion to remand, to be a controversy "arising under the laws of the United States." (*Auburn Savings Bank v. Hayes*, 61 Fed Rep., 911.)

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## JURISDICTION OF ACTIONS BY AND AGAINST RECEIVERS—continued.

*Amount necessary to give Federal court jurisdiction.*

- 14 (U. S. C. C., 1897). The Federal courts have no jurisdiction of a suit in equity against a national bank receiver, appointed by the Comptroller, unless the amount in controversy exceeds \$2,000. (*Smithson v. Hubbell et al.*, 81 Fed Rep., 593.)
- 15 (U. S. C. C., 1897). In a suit by a creditor of an insolvent national bank, in behalf of himself and all other creditors, to enjoin the receiver and the Comptroller from paying dividends on an alleged fraudulent claim which has been allowed by them, the jurisdictional amount is to be determined solely by the amount of complainant's own claim, and not by the aggregate of all the claims of those whom he assumes to represent, or by the amount of the dividends, payment of which is sought to be enjoined. (*Ib.*)
- 16 (U. S. C. C., 1904). Act Congress March 3, 1875, chapter 137, 18 Statutes, 470, provides that the United States circuit courts shall have jurisdiction of suits in equity, where the matter in dispute exceeds \$500, arising under the Constitution or laws of the United States. By act March 3, 1887, chapter 373, 24 Statutes, 552 (U. S. Comp. St. 1901, p. 514), the limit of jurisdiction was raised to \$2,000; but the act provided that such section should not be held to affect the jurisdiction of the courts of the United States in cases commenced by direction of any officer thereof, or cases for winding up the affairs of any national bank. *Held*, that the word "section," as used in the act of 1887, should be construed to refer to the entire act, and therefore such act did not deprive United States circuit courts of jurisdiction of a suit in equity brought by a receiver of a national bank, where the amount involved exceeded \$500, of which the court had jurisdiction under the former act. (*Rankin v. Herod*, 130 Fed. Rep., 390.)
- 17 (U. S. C. C., 1897). A receiver of an insolvent national bank, appointed by the Comptroller of the Currency, against whom an action is brought in a State court to recover less than \$2,000, has no right to remove the same to a Federal court. (*Follet v. Tillinghast*, 82 Fed. Rep., 241.)

*Receiver's appointment does not bring assets under control of Federal court.*

- 18 (U. S. C. C., 1897). The assets of an insolvent national bank are not brought under the control or protection of the Federal courts by being taken into custody by a receiver appointed by the Comptroller of the Currency, nor by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of Congress to wind up the affairs of the bank. (*Snohomish County v. Puget Sound National Bank*, 81 Fed. Rep., 518.)

*Courts have not general supervision of insolvent banks.*

- 19 (U. S. C. C., 1899). The courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and can not order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Revised Statutes, section 5234, to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association. (*In re Earle*, 92 Fed. Rep., 22.)

*Federal court loses jurisdiction when receiver's interest in property is transferred.*

- 20 (U. S. C. C., 1899). When the jurisdiction of a Federal court in an action by the receiver of a national bank depends solely on the official character of the plaintiff as such receiver, such jurisdiction is lost by a sale and transfer by the plaintiff of all his interest in the subject-matter of the litigation. (*Weaver v. Kelly*, 92 Fed. Rep., 417.)

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## JURISDICTION OF ACTIONS BY AND AGAINST RECEIVERS—continued.

*Removal of cases from State to Federal court.*

- 21 (U. S. C. C., 1894). A suit against the receiver of a national bank to compel him to pay out of the funds in his hands as receiver moneys claimed by the complainant is a suit arising under the laws of the United States, and can be removed into the Federal court. (*Hot Springs Independent School District, etc., v. First National Bank of Hot Springs*, 61 Fed. Rep., 417.)
- 22 (U. S. C. C., 1895). A suit against a receiver appointed by a Federal court for a cause arising out of his management of the property committed to his charge is one arising under the laws of the United States and may be removed from a State to a Federal court without regard to the citizenship of the parties or the nature of the controversy. (*Jewett v. Whitcomb et al.*, 69 Fed. Rep., 418.)
- 23 (U. S. C. C. A., 1900). An action against a receiver of a national bank in his official capacity is one arising under the laws of the United States, of which a Federal court has jurisdiction. (*McDonald v. State of Nebraska*, 101 Fed. Rep., 171.)
- 24 (U. S. C. C., 1890). A suit to recover property acquired by the removing defendant, as receiver of a national bank, by authority of the laws of the United States arises under the laws of the United States, within the meaning of the removal act of 1888 (25 Stat. L., 434). (*Sowles v. Witters et al.*, 43 Fed. Rep., 700.)
- 25 (U. S. C. C., 1890). Said act provides that the petition for removal shall be filed at or before the time the defendant is required to plead. A rule of the chancery court provided that the subpoena should require defendant's appearance on the first day of a stated term, and that he should answer within forty days from the return day or the day fixed for entering appearance. A subpoena required the defendant to answer on the first day of the April term, but the suit was not entered until the last day of court. The next stated term began on the second Tuesday in September. *Held*, that a petition for removal filed September 4 was in apt time. (Ib.)
- 26 (U. S. C. C. A., 1900). The receiver of a national bank is a proper, but not a necessary, party to an action against the bank pending in a State court at the time of his appointment, and while he may properly be admitted as a party on his application to defend in behalf of his trust, such admission does not give him the right to remove the cause to a Federal court. The right of removal given him by the Federal statutes applies only to cases where he is a necessary party to the action. (*Speckert et al. v. German National Bank*, 98 Fed. Rep., 151.)

*When Federal question not presented.*

- 27 (U. S. C. C., 1889). An action between a receiver of an insolvent national bank and a depositor involving only the right of set-off of deposits against notes due by the depositor does not present a Federal question under Revised Statutes, section 5242, avoiding preferences to creditors of such an insolvent bank. (*Tehan v. First National Bank et al.*, 39 Fed. Rep., 577.)

*Equity has jurisdiction in receiver's action to set aside fraudulent transfer.*

- 28 (U. S. C. C. A., 1899). Equity has jurisdiction of a bill by a receiver of a national bank to set aside a transfer of notes made by the bank to prefer a creditor. (*Alabama Iron and Railway Co. v. Austin*, 94 Fed. Rep., 897.)

*When case will not be reopened for the introduction of newly discovered evidence.*

- 29 (U. S. C. C., 1887). A case will not be reopened for the introduction of newly discovered evidence where such evidence is merely cumulative

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## JURISDICTION OF ACTIONS BY AND AGAINST RECEIVERS—continued.

and its sources were well known to the parties at the first hearing. (Witters, receiver, *v. Sowles et al.*, assignees, 32 Fed. Rep., 765.)

- 30 (U. S. C. C., 1887). Proceedings upon a decree will be stayed for the purpose of allowing parties to take and file testimony newly discovered, when such testimony appears to be material and its materiality was not so direct and apparent that the failure to discover and produce it on the first hearing amounted to laches. (Ib.)

*Where receiver of national bank may be sued in State court.*

- 31 (La., 1877). The receiver of a national bank is amenable to the jurisdiction of a State court in a parish other than that in which the bank was located and in which he has his domicile. (*Adams v. Daunis*, 1 N. B. C., 510; 29 La. Ann., 315.)

*When receiver not subject to order of State court.*

- 32 (N. Y. Sup.). A State court has no power to make an order directing the receiver of a national bank who has been appointed by the Comptroller of the Currency to pay a judgment obtained against the bank before the receiver was appointed. (*Ocean National Bank v. Carll*, 7 Hun., 237.)

## ACTIONS BY RECEIVERS.

*When receiver may sue without Comptroller's order.*

- 1 (U. S. Sup. Ct., 1901). Authorization by the Comptroller is not necessary to entitle a receiver of a national bank to bring an action to establish a claim of the bank against an insolvent debtor and for the sale of collateral held by the bank, since the provision of United States Revised Statutes, section 5234, to the effect that the receiver shall be under the direction of the Comptroller, means only that he shall be subject to such direction, and not that he shall be obliged to get special authority for every act that he does in collecting the assets and debts of the bank. (*Sumpter Turner, syndic of M. Schwartz & Company, Plff. in Err., v. F. L. Richardson, receiver of the American Nat. Bank*, 3 Banking Cases, 232; 180 U. S., 87.)
- 2 (U. S. C. C. A., 1895). A bill by the receiver of an insolvent national bank against the shareholders to recover dividends unlawfully paid out of the capital at times when the bank had earned no net profits may be brought without an express order from the Comptroller of the Currency. (*Hayden v. Thompson*, 71 Fed. Rep., 60.)

*Code provisions when not applicable to receiver's suits.*

3. The provisions of the codes that every action must be brought in the name of the real party in interest, except in the case of the trustee of an express trust or of a person authorized by a statute to sue, does not apply to the receiver of a national banking association suing in a Federal court held in a State which has adopted the code procedure; for the right of the receiver to sue is derived from the national banking law.
- (U. S. Cir. Ct.) *Bailey, receiver, v. Sawyer*, 4 Dill. (U. S. C. C.), 463;
- (U. S. Dist. Ct.) *Strong, receiver, v. Southworth*, 8 Ben. (U. S. Dist. Ct.), 331;
- (U. S. Dist. Ct.) *Stanton v. Wilkeson*, 8 Ben. (U. S. Dist. Ct.), 357.

*Where receiver may sue.*

- 4 (U. S. Dist. Ct.). A receiver of a national bank is an officer of the United States, and as such may sue in the Federal courts in the district in which such bank is located. (*Frelinghuysen, receiver, etc., v. Baldwin and others*, 12 Fed. Rep., 395.)

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## ACTIONS BY RECEIVERS—continued.

- 5 (U. S. C. C., 1888). The receiver of a national bank in liquidation, having received his appointment from the Comptroller of the Currency, under the national banking laws is an officer of the United States, and as such may sue in the circuit court, without regard to citizenship or the amount involved, under Revised Statutes 629, clause 3, conferring on that court jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under authority of any acts of Congress, are plaintiffs." (*Armstrong v. Ettlesohn*, 36 Fed. Rep., 209.)
- 6 (U. S. C. C., 1899). The receiver of a national bank may be sued in a Federal court in relation to a contract made by him on behalf of the estate in the course of its administration. (*Gilbert v. McNulta*, 96 Fed. Rep., 83.)
- 7 (U. S. C. C., 1894). A Federal court is not deprived of jurisdiction, otherwise vested in it, of a suit by the receiver of a national bank against the executors of an estate by the fact that the estate is in the possession of a State probate court for purposes of administration; and the Federal court has jurisdiction to adjudge whether a liability exists, but can not issue execution to enforce the same. (*Wickham v. Hull et al.*, 60 Fed. Rep., 326.)
- 8 (N. Y.). The receiver appointed by the Comptroller of the Currency, for a national bank located in another State is not a foreign receiver, and may sue in the courts of New York for an assessment levied on shareholders of the bank without regard to the doctrine of comity. (*Peters v. Foster*, 10 N. Y. S., 389.)

*Receiver an officer of the United States under Revised Statutes, section 563.*

- 9 (U. S. Dist. Ct., 1890). A receiver of an insolvent national bank is an officer of the United States within the meaning of section 563, Revised Statutes, which gives the district courts jurisdiction of "all suits at common law brought by the United States or any officer thereof authorized by law to sue." (*Stephens v. Bernays*, 41 Fed. Rep., 401.)
- 10 (U. S. C. C., 1895). A receiver of a national bank, appointed by the Comptroller of the Currency, is an officer of the United States, and entitled to sue in the Federal courts, by virtue of Revised Statutes, section 629. (*Thompson v. Pool*, 70 Fed. Rep., 725.)
11. A receiver of an insolvent national bank is an officer of the United States.  
(U. S. C. C., 1898) *Speckert et al. v. German Nat. Bank et al.*, 85 Fed. Rep., 12;  
(U. S. Dist. Ct.) *Stanton v. Wilkeson*, 8 Ben., 357.
- 12 (U. S. Dist. Ct., 1868). The receiver of a national bank appointed by the Comptroller of the Currency is an officer of the United States, and therefore the district court has jurisdiction of an action at common law to collect a claim due the bank at the time of the receiver's appointment. (*Platt v. Beach*, 1 N. B. C., 182; 2 Ben., 303.)
- 13 (U. S. C. C. A., 1899). As a receiver appointed by the Comptroller of the Currency to close up the affairs of an insolvent national bank may sue in a Federal court without regard to the amount in controversy, and a suit in equity in a Federal court to restrain such a receiver from prosecuting an action at law in the same court is merely ancillary to such action, the bill in such suit can not be demurrable on account of the amount in controversy. (*Aldrich v. Campbell*, 2 Banking Cases, 481; 97 Fed. Rep., 663.)

*Receiver's suit to recover assets—pleading.*

- 14 (U. S. C. C., 1888). The complaint in an action to recover the value of certain notes alleged to have been the property of a bank of which plaintiff was a receiver, and to have been wrongfully converted by

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## ACTIONS BY RECEIVERS—continued.

defendant, contained two counts. The first charged that an officer of plaintiff's bank surreptitiously took these notes from its vaults and delivered them to defendant, which took with knowledge, etc.; the second charged that plaintiff's bank, in contemplation of insolvency, and with a view to prevent the application of these assets in the way prescribed by law, transferred them to defendant. *Held*, that a demurrer on the ground of a misjoinder of causes of action would not lie, the two counts in reality stating but one cause of action. (*Brown v. Carbonate Bank of Leadville*, 34 Fed Rep., 776.)

- 15 (U. S. C. C., 1888). The first count states clearly and distinctly what would be tantamount to the common-law action of trover, and does not attempt to unite that form of action with one under Revised Statutes, United States, section 5242, declaring void all preferences made by a national bank after or in contemplation of insolvency. (*Ib.*)
- 16 (U. S. C. C., 1888). The allegation in the second count of the complaint—that plaintiff's bank, after having refused to pay its circulating notes and suspended payment to its creditors, and, being in default and in contemplation of insolvency, assigned and transferred certain notes to defendant, with a view to prevent the application of its assets among its creditors in the manner provided by law—is not open to objection as stating merely conclusions of law. (*Ib.*)

*Receiver's action for conversion—limitations.*

- 17 (U. S. C. C., 1897). An action by the receiver of an insolvent national bank, in which it is alleged that the defendant, to which negotiable paper was sent by the bank for collection, appropriated the proceeds thereof and refused to pay the same over on demand, is an action for the conversion of chattels, and is governed by the limitation fixed by subdivision 3 of section 338 of the California Code of Civil Procedure relating to actions for "taking, detaining, or injuring any goods or chattels." (*Hawkins v. State Loan & Trust Co.*, 79 Fed. Rep., 50.)

*Defenses—ultra vires.*

- 18 (U. S. C. C., 1897). Defendant received, in trust for a national bank, stock in another bank, executing his note for the same at its par value, in order that the books of the bank might not show that it was the owner of the stock. He afterwards received dividends and securities in liquidation of such stock, and turned over the securities and paid part of the dividends to the bank, taking up his note and executing a new note for the balance of the dividend. *Held*, that he could not defend against such note in the hands of a receiver on the ground that he was an accommodation maker. (*Tillinghast v. Carr*, 82 Fed. Rep., 298.)
- 19 (U. S. C. C., 1897). An agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction, such securities having been received by such maker as trustee for the bank. (*Ib.*)

*Defenses—false representation by president relating to soundness of another bank.*

- 20 (U. S. C. C., 1904). In an action by the receiver of a national bank on a bond and for an overdraft, an affidavit of defense alleging that the president of such bank prior to its failure was also president of another institution in which defendant was a depositor, and that the president falsely assured defendant of the soundness of such other institution, and that defendant thereby lost a sum in excess of the claim in suit, was insufficient. (*Earle v. Munce*, 133 Fed. Rep., 1008.)

ACTIONS—Continued.

ACTIONS BY RECEIVERS—continued.

*Appeal.*

- 21 (Idaho, 1900). A receiver has no right to appeal from an order or judgment made in the action in which he is appointed, without permission of the court appointing him, when he has no personal interest in such order or judgment: and if he does so the appeal should be dismissed at his personal cost, and without cost to the estate in his hands. (First Nat. Bank of Pocatello v. C. Bunting & Co. et al., 2 Banking Cases, 239; 7 Idaho, 27.)

*Appeal bond, when not required of receivers.*

- 22 (U. S. Sup. Ct., 1885). Under section 1001, Revised Statutes, no bond for the prosecution of the suit, or to answer in damages or costs, is required on writs of error or appeals issuing from or brought to the Supreme Court of the United States by direction of the Comptroller of the Currency in suits by or against insolvent national banking associations or the receivers thereof. (Pacific National Bank v. Mixter, 114 U. S., 463.)

*Opening compromise.*

- 23 (Pa. Com. Pleas, 1876). A compromise of a suit by the receiver of a national bank and counsel for the United States will not be opened after a delay of seven years, no fraud being shown. (Henderson v. Myers, 11 Phil., 616; 3 N. B. C., 759.)

*Suits in equity to recover dividends.*

- 24 (U. S. Sup. Ct., 1899). The receiver of a national bank can not recover a dividend paid to a stockholder not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent. (McDonald, Receiver, v. Williams, 174 U. S., 397.)
- 25 (U. S. C. C. A., 1899). The receiver of a national bank can not recover from a stockholder in an action at law the sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent. (Lawrence v. Greenup, (C. C. A.), 97 Fed. Rep., 906.)
- 26 (U. S. C. C. A., 1895). Equity has jurisdiction of a suit by the receiver of an insolvent national bank against all its shareholders to recover dividends unlawfully paid to them out of the capital at times when the bank had earned no net profits, and was in fact insolvent, it being in effect a suit to execute a trust to undo a fraud and to prevent a multiplicity of suits. (Hayden v. Thompson et al., 71 Fed. Rep., 60.)
- 27 (U. S. C. C. A., 1895). A bill by the receiver to recover the dividends illegally paid may be brought without an express order from the Comptroller of the Currency. (Ib.)
- 28 (U. S. C. C. A., 1895). It can not be urged as a defense to such suit that the remedies provided by the national-banking act are exclusive, the right to recover diverted trust funds not being dependent on statute. (Ib.)
- 29 (U. S. C. C. A., 1895). The fact that some of the defendants participated in but one or two of the sixteen dividends on which the suit was based, that others participated in more, and others in all the dividends, does not render the bill multifarious. (Ib.)
- 30 (U. S. C. C., 1899). A receiver of an insolvent national bank may maintain a suit in equity in any district against all the stockholders within the court's jurisdiction to recover back unearned dividends received by them, and unlawfully paid from the bank's capital when



INSOLVENCY AND RECEIVERS—Continued.

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ACTIONS BY RECEIVERS—continued.

insolvent, on the ground that it is a suit to follow trust funds. (*Hayden v. Brown*, 94 Fed. Rep., 15.)

- 31 (U. S. C. C. A., 1899). The receiver of an insolvent national bank may recover from a stockholder dividends declared and paid after the bank became insolvent where necessary to meet the demands of creditors. (*Hayden v. Williams*, 96 Fed. Rep., 279.)
- 32 (Wis., 1901). Where dividends are paid a stockholder in an insolvent bank in disobedience to the banking act (Rev. Stat., 1898, sec. 2024, subsec. 40), the liability to repay is owed to the corporation and enforceable by it. (*Gager et al. v. Paul et al.*, 87 N. W. Rep., 875; 4 Banking Cases, 30; 111 Wis., 638.)
- 33 (Wis., 1901). Though such liability is owed to the corporation a creditor thereof may proceed in equity to compel restoration on the corporation's failing to do so. (*Ib.*)

*Limitations in actions for dividends.*

- 34 (U. S. C. C. A., 1895). The national courts, sitting in equity, act or refuse to act in analogy to the statute of limitations of the States in which they are sitting. (*Hayden v. Thompson et al.*, 71 Fed. Rep., 60.)
- 35 (U. S. C. C. A., 1895). A stockholder in an insolvent bank who receives a dividend from funds properly belonging to the creditors holds it under an implied and not an express trust in favor of the creditors, and hence limitations run in his favor against an action to recover the dividend. (*Ib.*)
- 36 (U. S. C. C. A., 1895). The rule that the time limited for beginning an action for fraud shall not commence to run while defendant conceals it does not apply when the concealment is by a third person. (*Ib.*)
- 37 (U. S. C. C. A., 1895). In the absence of fraud, the cause of action to recover the dividend wrongfully paid arose when the payment was made, and not upon the appointment of the receiver and the discovery that the other assets of the bank were insufficient to pay its debts. (*Ib.*)

*Set-off of judgments against dividend.*

- 38 (U. S. C. C., 1889). Where complainant has a decree in equity that defendant pay her dividends on stock held by her, and defendant has against complainant an unsatisfied judgment at law for an assessment on said stock, the court, on motion, will order the amounts to be paid under the decree applied on the judgment, though the judgment was at a former term and complainant intends to appeal therefrom. (*Sowles v. Witters et al.*, 40 Fed. Rep., 413.)

ACTIONS AGAINST RECEIVERS.

*Where receiver may be sued.*

- 1 (U. S. C. C.). Receivers of national banks have not the privilege in all cases of being sued in the Federal courts, and are not entitled to remove causes against them from the State to the United States courts. (*Bird's Executors v. Cockrem*, 2 Woods, 32.)
- 2 (La. Sup., 1877). National banks, like any other corporations, and the receivers of them, may sue and be sued in the State courts of their domicile. (*Adams v. Daunis*, 1 N. B. C., 510; 29 La. Ann., 315.)
- 3 (La. Sup., 1877). The receiver of a national bank is amenable to the jurisdiction of a State court in a parish other than that in which the bank was located and in which he had his domicile. (*Ib.*)

*Attachment of funds in receiver's hands not allowed.*

- 4 (Cal.). The amendment of March 3, 1873 (Rev. Stat. U. S., sec. 5242), to section 57 of the national banking act of June 3, 1864, which provides that no attachment shall be issued against a national bank

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## ACTIONS AGAINST RECEIVERS—continued.

or its property before final judgment in any suit, action, etc., is mandatory, and applies to attachments issuing from State courts against such banks. (*Dennis v. First Nat. Bank*, 59 P., 777; 127 Cal., 453.)

- 5 (Cal.). The amendment of March 3, 1873 (Rev. Stat. U. S., sec. 5242), to section 57 of the national banking act of June 3, 1864, which provides that no attachment shall be issued against a national bank or its property before final judgment, is constitutional. (*Ib.*)

*Garnishment of receiver.*

- 6 (U. S. Sup. Ct., 1900). An attachment of a national bank and its receiver as garnishees can be maintained in a State court, although it can not create any lien upon specific assets of the bank in the receiver's hands, or disturb his custody of those assets, or prevent him from paying to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys coming into his hands or realized by him as receiver from the sale of the property and assets of the bank. (*Earle v. Conway*, 20 S. Ct., 918; 178 U. S., 456.)
- 7 (U. S. Sup. Ct., 1900). The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver subject to a lien in favor of the plaintiff in the attachment, which can not be disregarded or displaced by the Comptroller of the Currency. (*Earle v. Commonwealth of Pennsylvania*, 20 S. Ct., 915; 178 U. S., 449.)
- 8 (Pa.). An attachment on execution by garnishment of money in the possession of a national bank is not an attachment against a national banking association under Revised Statutes United States, section 5242, providing that "no attachment \* \* \* shall be issued against such association, or its property, before final judgment in any suit, action, or proceeding in any State, county, or municipal court." (*Conway v. Chestnut St. Nat. Bank*, 42 A., 303; 189 Pa. St., 610.)
- 9 (Pa.). A national bank or the receiver of a national bank may be summoned as garnishee in an attachment execution in a State court, issued after a judgment against the defendant, although Revised Statutes, section 5242, provides that no attachment, injunction, or execution shall be issued against such bank in any action in any State, county, or municipal court. (*Conway v. Shall*, 42 Weekly Notes of Cases, 328.)

*When proceedings in State courts not suspended.*

- 10 (Ga., 1879). Until a receiver has been appointed by a Federal court wherein the interposition of equity to settle the affairs of a national bank was invoked and the appointment of a receiver asked to take charge of the assets, neither law nor comity requires the State court to suspend its equitable remedy to reach the assets of the bank and enforce its own final process until the Federal court shall act, especially where in the Federal court the case is made by the stockholders of the bank and the judgment creditor is not made a party thereto. (*Merchants and Planters' National Bank v. Trustees Masonic Hall*, 2 N. B. C., 220; 63 Ga., 549.)

*Judgments against bank after receiver appointed.*

- 11 (Ill., 1899). It is proper in a suit on the contract of a national bank after its receiver has been appointed to render judgment against the bank alone, and enter an order requiring the receiver to certify the claim in judgment to the Comptroller of the Currency of the United States, to be paid by him in due course of administration of the assets of the bank. (*Wolf v. National Bank of Illinois*, 52 N. E. Rep., 896; 178 Ill., 85.)

## INSOLVENCY AND RECEIVERS—Continued.

## ACTIONS—Continued.

## ACTIONS AGAINST RECEIVERS—continued.

*Suits to establish claims, parties, limitations, evidence, decree.*

- 12 (U. S. C. C. A., 1896). It seems that an accounting of the assets which have come to the hands of the receiver in an insolvent national bank can not be decreed in a suit to which the Comptroller of the Currency is not a party. (*Merrill v. National Bank of Jacksonville*, 75 Fed. Rep., 148.)
- 13 (U. S. C. C. A., 1896). In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the Comptroller of the Currency, but such decree should direct that the claim of the creditor, as established, be certified to the Comptroller, to be paid in due course of administration. (Ib.)
- 14 (U. S. C. C., 1888). In an action against the receiver of a bank for dividends upon a debt for a deposit in the name of "S., trustee," the mere general statement of S. that the money deposited was his daughter's, in connection with evidence that she owned property of which he had the management and from which the fund deposited might have been derived, it not being shown that it was derived therefrom, is not sufficient to enable the daughter to recover. (*Sowles et al. v. Witters*, 35 Fed. Rep., 463.)
- 15 (Iowa Sup., 1869). In a proceeding for the adjudication of a claim against a national bank that has suspended, the receiver appointed under the national banking act may be properly joined as a party defendant. (*Turner v. The First Nat. Bank of Keokuk et al.*, 1 N. B. C., 454; 26 Iowa, 562.)

## PROOF AND PAYMENT OF CLAIMS.

## CLAIMS PROVABLE.

*When surety may prove claim.*

- 1 (U. S. C. C., 1893). A surety may pay the debt and then prove it, or he may compel the creditor to prove it. But he can not without paying the debt make a second proof after the same debt has once been proved by the creditor. (*Stewart v. Armstrong*, 56 Fed. Rep., 167.)

*Creditors may prove entire claims regardless of collaterals.*

- 2 (U. S. Sup. Ct., 1899). A creditor of an insolvent national bank is entitled to prove the whole amount of the claims against it held by him, without reference to the collateral held to secure such claims. (*Chemical Natl. Bank v. Armstrong*, 8 C. C. A., 155; 59 Fed. Rep., 372; 16 U. S. App., 465, followed. *Merrill v. National Bank of Jacksonville*, 75 Fed. Rep., 148; 173 U. S. Rep., 131.)

*Two judgments and dividends on same debt not allowed.*

- 3 (U. S. C. C. A., 1896). Complainants, on the request of a national bank needing funds, signed an accommodation note for \$10,000, payable to its order, with the understanding that it would discount the same and use the proceeds in its business. The bank at the same time agreed to place to the credit of complainants on its books an amount equal to the proceeds of the note, complainants stipulating that they would not check against this credit except to pay the note or to reimburse themselves for paying it. The credit was accordingly made, and the bank, after continuing business for some time failed, and complainants were compelled to pay the note. They thereafter recovered a judgment at law against the bank's receiver for the amount paid to take up the note, and sued in equity for the amount placed to their credit according to agreement. *Held*, that they were not entitled to two judgments for the same debt and to dividends on both judgments until one of them was satisfied, and that the bill must therefore be dismissed. (*Latimer v. Wood et al.*, 73 Fed. Rep., 1001.)

## INSOLVENCY AND RECEIVERS—Continued.

## PROOF AND PAYMENT OF CLAIMS—Continued.

## CLAIMS PROVABLE—continued.

*Liability for rent.*

- 4 (U. S. Sup. Ct., 1896). After passing into the hands of a receiver appointed by the Comptroller of the Currency under the provisions of the Revised Statutes, a national bank remains liable, during the remainder of the term, for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them; but if the lessor, in the exercise of a power conferred by the lease, reenters and relets the premises, the liability of the bank after the reletting is limited to the rent then accrued and unpaid, and the diminution, if any, in the rent for the remainder of the term after the reletting. (*Chemical National Bank v. Hartford Deposit Company*, 161 U. S., 1.)
- 5 (U. S. C. C., 1901). The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders, or creditors. He is not entitled to have a contract made by the bank, and which has been executed, set aside on the ground merely that it was ultra vires. (*Brown v. Schleier et al.*, 112 Fed. Rep., 577.)
- 6 (U. S. C. C., 1901). The receiver of a national bank can not attack the validity of a contract by which the bank leased ground for ninety-nine years for the purpose of building thereon, on the ground that it was ultra vires, since the bank was authorized to purchase and hold in fee real estate for certain specified purposes, and the question whether it exceeded its powers either in making the lease or in the erection of the building, is one which can only be raised by the Government. (Ib.)
- 7 (U. S. C. C., 1901). A contract by which a national bank leased ground for ninety-nine years, agreeing to pay the monthly rental therefor, does not create an indebtedness for the full amount of the rental accruing during the term. (Ib.)
- 8 (U. S. C. C., 1901). A national bank leased ground for a term of ninety-nine years, and expended over \$300,000 in the erection of a building thereon. It occupied a portion of the building as a banking house and rented the remainder to tenants. By a subsequent contract it surrendered the building to the owner of the land, and the lease was canceled. A receiver was afterwards appointed for the bank, who brought suit to charge the property with a lien for the money expended in the erection of the building, on the ground that the action of the bank in making the lease and in expending the money was ultra vires. No fraud was shown in the transaction and it did not appear that any of the creditors were such when the lease was made. *Held*, that the receiver, under such circumstances, had no greater rights than the bank, and that the bill stated no ground for relief. (Ib.)

*Subscribers to increased stock as creditors.*

- 9 (U. S. C. C., 1889). A subscriber who has made payments on his subscription to the proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver's hands. (*Armstrong v. Stannage*, 37 Fed. Rep., 508.)
- 10 (U. S. C. C. A., 1895). One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank at a time when no increase had been authorized, on false representations of the cashier as to the bank's condition, it being, in fact, insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid. (*Newbegin v. Newton National Bank*, 66 Fed. Rep., 701.)

## INSOLVENCY AND RECEIVERS—Continued.

## PROOF AND PAYMENT OF CLAIMS—Continued.

## CLAIMS PROVABLE—continued.

- 11 (Mo. App., 1888). A national bank determined to increase its capital stock from \$300,000 to \$500,000. The new stock subscriptions amounted to only \$130,060. The bank advertised an increase to \$430,060. This was never authorized by vote of the stockholders, nor certified to or approved by the Comptroller of the Currency. The plaintiff subscribed and paid \$2,000 for so much of the originally proposed increase. *Held*, that plaintiff did not become a stockholder, and when the bank became insolvent was entitled to judgment against the receiver for the amount so paid. (Schierenberg v. Stephens, 32 Mo. App., 314; 3 N. B. C., 528.)

*Receiver liable for frauds of bank.*

- 12 (U. S. C. C. A., 1894). An embarrassed bank which organized a trust and safe deposit company to aid in its struggles for existence, *held* liable for funds abstracted from the trust company and used for the bank, on the ground that the organization and use made of the former was a fraud on the public. (Fisher v. Adams, 63 Fed. Rep., 674.)

*Rights of creditors holding collaterals.*

- 13 (U. S. C. C., 1896). When a creditor of an insolvent estate holds collateral securities for his debt he is not required to exhaust his remedy upon such securities, nor to surrender them to the assignee or receiver administering such assigned estate, before receiving a dividend therefrom. (Wheeler v. Walton & Whann Co., 72 Fed. Rep., 965.)

*Receiver liable for money received by bank.*

- 14 (U. S. C. C. A., 1896). The receiver of an insolvent national bank is liable for money borrowed by the president of the bank without special authority when it appears that the bank actually received the money and appropriated it to its own use. (Western National Bank v. Armstrong, 152 U. S., 346; 14 Sup. Ct., 572, distinguished. Blanchard v. Commercial Bank of Tacoma, 75 Fed. Rep., 249.)

*Expenses of receivership—when stockholders not liable.*

- 15 (U. S. Sup. Ct., 1887). The expenses of a receivership of a national bank appointed in a creditor's suit contesting a voluntary liquidation of the bank can not be charged upon stockholders as part of their statutory liability, but must come from the creditors at whose instance the receiver was appointed. (Richmond v. Irons, 121 U. S., 27.)

*Claims for damages are paid ratably with debts.*

- 16 (Iowa). Claims arising out of the nonfeasance or malfeasance of the association should be paid ratably with the debts, technically so called. (Turner v. First National Bank of Keokuk et al., 26 Iowa, 562.)

*Demand of deposit of receiver.*

- 17 (S. C., 1902). Where a bank is in the hands of a receiver, a demand for payment of a deposit due by the bank is properly made by drawing a check on the bank and demanding payment thereof of the receiver. (Wylie v. Commercial and Farmers' Bank, 4 Banking Cases, 497; 41 S. E. Rep., 504; 63 S. C., 406.)

*General depositors are general creditors.*

- 18 (Mo., 1900). Where a guardian deposited a trust fund with a bank as an ordinary depositor, and it was mingled with the other funds of the bank upon the insolvency of the bank, the cestui qui trust was not entitled to a preference over other creditors merely because the bank was aware that the fund was a trust fund, but, in order to entitle the cestui to a preference, it must have been a special deposit

## INSOLVENCY AND RECEIVERS—Continued.

## PROOF AND PAYMENT OF CLAIMS—Continued.

## CLAIMS PROVABLE—continued.

- creating a trust relation, and not merely the relation of creditor and debtor. (*Paul v. Draper*, 3 Banking Cases, 50; 158 Mo., 197.)
- 19 (Nebr., 1899). The owner of a sum of money on a general deposit in a bank at the time of its failure is not entitled to a preferred claim against the assets in the hands of its receiver. (*Schmelling v. State et al.*, 1 Banking Cases, 670; 57 Neb., 562.)
- 20 (Okla., 1900). A general depositor is merely a general creditor of the bank, and is not entitled to any priority of payment over other general creditors, in case of an assignment for the benefit of creditors or of bankruptcy. (*Bank of Blackwell v. Dean*, 2 Banking Cases, 232; 9 Okla., 626.)

## EFFECT OF PROOF OF DEPOSIT AGAINST INSOLVENT BANK.

- 1 (U. S. Sup. Ct., 1876). The claims of depositors in a suspended national bank are, when proven to the satisfaction of the Comptroller of the Currency, on the same footing as if they were reduced to judgments. (*National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S., 437; 1 N. B. C., 133.)

## COMPUTING AMOUNT OF CLAIM AGAINST BANK.

*What credits not required on collaterals.*

- 1 (U. S. Sup. Ct.). Collections from a collateral security made by a creditor of a national bank after the declared insolvency of the bank need not be deducted from the amount on which dividends are to be computed by the receiver of the bank, as the secured creditor is a creditor to the full amount due him when the insolvency is declared, and his right to dividends is unaffected by his collateral.  
(U. S. Sup. Ct., 1900) *Aldrich, Receiver, etc., v. Chemical Nat. Bank of New York*, 20 Sup. Ct. Rep., 498; 176 U. S., 618;  
(U. S. Sup. Ct., 1899) *Merrill v. National Bank of Jacksonville*, 173 U. S., 181.
- 2 (U. S. C. C., 1896). The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. (*New York Security and Trust Co. et al. v. Lombard Inv. Co. of Kans. et al.*, 73 Fed. Rep., 537.)
- 3 (N. Y.). Creditor of insolvent bank has the right to prove and have dividends upon his entire claim, irrespective of collateral security he may hold. (*People v. Remington*, 121 N. Y., 328.)

## PRIORITIES—NONE GAINED BY FILING CREDITOR'S BILL.

- 1 (U. S. C. C., 1883). The manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors, and the diligence of a creditor who files a creditor's bill can give him no greater rights than are given any other creditor to share in the distribution of the assets, and a prayer in the bill that such creditor be given priority over other creditors will not be granted. (*Irons, executor, etc., et al. v. Manufacturers' National Bank of Chicago et al.*, 17 Fed. Rep., 308.)

## PRIORITIES BETWEEN BANKS.

*When creditor bank has lien on insolvent bank funds.*

- 1 (U. S. C. C. A., 1894). A contract between two national banks that the proceeds of paper, discounted by one for the other, should not be

## INSOLVENCY AND RECEIVERS—Continued.

## PROOF AND PAYMENT OF CLAIMS—Continued.

## PRIORITIES BETWEEN BANKS—continued.

drawn on in advance of the maturity of such paper, is not affected by the subsequent fraud of the bank obtaining the discount in reporting such proceeds to the Comptroller of the Currency as part of its cash reserve. (*Fisher v. Tradesmen's National Bank*, 64 Fed. Rep., 706.)

- 2 (U. S. C. C. A., 1894). A contract by which one bank pledges any of its property in the hands of another bank, as collateral to notes discounted for and guaranteed by it, authorizes the discounting bank to hold a deposit balance, standing to the credit of the borrowing bank at the time of its insolvency, as collateral to any liability, then or at maturity of the discounted notes, until the amount of the lien has been ascertained. (*Fisher v. Continental National Bank*, C. C. A., 64 Fed. Rep., 707.)
- 3 (U. S. C. C., 1890). Revised Statutes, section 5242, which invalidates all transfers of the notes, bonds, or bills of exchange of a national bank after the commission of an act of insolvency with a view to the preference of one creditor over another, does not prohibit a bank which has in good faith accepted the draft of a national bank the day before the latter's insolvency, and afterwards paid the same, from applying the proceeds of collections made by it on paper in its hands belonging to the insolvent bank to the payment of the draft, since its lien on such collection runs from the date of the acceptance. (*In re Armstrong*, 41 Fed. Rep., 381.)

## PREFERENCES IN INSOLVENCY.

## MEANING OF "INSOLVENCY."

- 1 (U. S. C. C. A., 1898). Revised Statutes, section 5242, declaring void payments made by a national bank after the commission of an act of bankruptcy, or in contemplation thereof, with a view to prevent the lawful application of its assets, means an act of bankruptcy or insolvency in the legal sense of a failure to pay current obligations in the ordinary course, and does not invalidate payments made in the usual course of business before commission of any such act, and not in contemplation thereof, though the bank, if wound up at the time, would in fact be unable to meet all its obligations. (*Hayden v. Chemical National Bank of New York*, 84 Fed. Rep., 874, affirmed by U. S. Sup. Ct., 174 U. S. Rep., 610.)
2. The term "insolvency," as used in section 5242, Revised Statutes, forbidding transfer of the assets of national banking associations after or in contemplation of such insolvency, has the same meaning as it had in the bankrupt act; that is, it does not mean an absolute inability of a debtor to pay his debt at some future time upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of business.  
(U. S. C. C., 1874) *Case v. Citizens' Bank of Louisiana*, 2 Woods, 23; 1 N. B. C., 276;  
(N. Y. Sup. Ct.) *Market Bank v. Pacific National Bank*, 30 Hun, 50.

*What is contemplation of insolvency.*

- 3 (U. S. Sup. Ct., 1899). It can not be said that all payments made in the due course of business by a bank when its officers know its condition is that of actual insolvency are made in contemplation of insolvency, or with a view to prefer one creditor to another. The several payments and remittances made to the Chemical Bank by the Capital Bank before its insolvency were not made in contemplation of insolvency, or with a view to prefer the Chemical Bank. These checks and remittances were not casual, but were plainly made under a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital Bank, but were

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## MEANING OF "INSOLVENCY"—continued.

to be credited to its constantly overdrawn account; and when letters containing them were deposited in the post-office, such mailing was a delivery to the Chemical Bank, whose property therein was not destroyed or impaired by the insolvency of the Capital Bank, taking place after the mailing and before the delivery of the letters containing the remittances. (McDonald, receiver, *v.* Chemical National Bank, 174 U. S., 610; 1 Banking Cases, 657.)

- 4 (U. S. C. C., 1885). A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. (Roberts, receiver, etc., *v.* Hill, administrator, etc., 24 Fed. Rep., 571.)

*The fact that the reserve is below the legal requirement does not affect bank's transactions.*

- 5 (U. S. Sup. Ct., 1902). The mere reduction of the reserve of a national bank below the legal limit does not affect, with a legal presumption of bad faith, all transactions made with or concerning the bank during the period whilst the reserve is impaired. (Earle *v.* Carson, 188 U. S., 42.)

## WHEN INTENT TO GIVE PREFERENCE PRESUMED.

- 1 (U. S. C. C., 1885). The intent to give a preference is presumed when a payment is made to a creditor by a bank whose officers know of its insolvency, and therefore that it can not pay all of its creditors in full. (Roberts, receiver, etc., *v.* Hill, administrator, etc., 24 Fed. Rep., 571.)
- 2 (U. S. C. C., 1885). After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, will be presumed to be made with a fraudulent intent. (National Security Bank *v.* Price, receiver, 22 Fed. Rep., 697.)

## NOTES GIVEN IN RENEWAL OF OTHERS NOT EVIDENCES OF DEBT OR ASSETS WITHIN THE MEANING OF SECTION 5242.

- 1 (Ala.). Notes given in renewal of other notes held by a national bank, the original notes not being returned to the maker, are not "evidence of debt" or "assets" within Revised Statutes, section 5242, declaring void all transfers of "evidence of debt" owing to any national bank made after insolvency, or in contemplation thereof, to prevent the application of the assets of the bank, as required by law, or with a view to prefer creditors. (First National Bank of Decatur *v.* Johnston, 11 So., 690; 97 Ala., 655.)

## VALID PREFERENCES.

*Mortgage or pledge for present loan valid.*

- 1 (U. S. C. C., 1890). Revised Statutes United States, section 5242, which prohibits all transfers by any national banking association made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor over another, is directed to a preference, not to the giving of security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such loan until the debt is paid, though the debtor is insolvent and the creditor has reason at the time to believe that to be the fact. (Armstrong *v.* Chemical National Bank, 41 Fed. Rep., 234.)



## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## VALID PREFERENCES—continued.

- 2 (U. S. C. C., 1893). Revised Statutes, section 5242, which declares all deposits, all transfers of deposits, and all payments of money made by a national bank after an act of insolvency, or in contemplation thereof, to be null and void, does not render illegal the retention of a balance standing to the credit of an insolvent national bank with a correspondent on the day of its failure which has been pledged for the purpose of securing loans made by the correspondent to the insolvent bank. (*Bell v. Hanover National Bank*, 57 Fed. Rep., 821.)
- 3 (U. S. C. C., 1893). Where a deposit with a correspondent has, long prior to the commission of the act of insolvency by a national bank, been pledged as collateral to secure the payment of loans made to the insolvent by its correspondent, neither the subsequent insolvency of the bank nor the appointment of the receiver destroys the lien of the correspondent or its rights to dispose of the pledge to satisfy the debt secured. (*Ib.*)

*Insolvent bank's mortgage for present loan valid.*

- 4 (U. S. C. C. A., 1899). Revised Statutes, section 5242, does not invalidate a transfer of property by a national bank to secure advances made to it at the time, though it is insolvent or in contemplation of insolvency; nor is such transfer, to the extent of such advances, rendered invalid by the fact that, as a part of the same transaction, it is agreed that such property shall also stand as security for an antecedent indebtedness, where the creditor acts in good faith and in the belief that the bank is solvent. (*Stapylton v. Stockton*, 91 Fed. Rep., 326.)
- 5 (U. S. C. C. A., 1899). The fact that a deed to property of a national bank, executed by its president as security for a loan obtained for the bank, and enforceable as an equitable mortgage, was not recorded until the day the bank closed its doors, does not entitle other creditors to set aside such deed, where there was no agreement to withhold it from record, and under the laws of the State it was good as a mortgage between the parties, whether recorded or not. (*Ib.*)
- 6 (U. S. C. C. A., 1899). The president of a national bank, who owned a majority of its stock and exercised full control over its affairs, with the acquiescence of the directors, obtained a loan for the bank at a time when it was, in fact, insolvent, though not known or believed to be so by the lender, and, as security, executed a deed to the bank building and lot, producing a certified copy of what purported to be the minutes of the action of the board of directors authorizing the conveyance, though no such action had, in fact, been taken. *Held*, that though insufficient as a formal conveyance by the bank, where authorized by the course of decisions in the State such deed would be upheld as an equitable mortgage. (*Ib.*)

*May assign securities to secure previous debts.*

- 7 (Ill. Sup., 1878). As security for a preexisting debt, a national bank may make an assignment of a note and a real mortgage contemporaneously executed to secure such note. (*Worcester National Bank v. Cheeney*, 87 Ill., 603; 2 N. B. C., 227.)

*When payment after insolvency valid.*

- 8 (Ill. Sup.). Where an insolvent debtor, just before making an assignment for the benefit of creditors, and after he has determined to make it, pays in cash an interest-bearing debt, not then due, and the creditor, without notice of the debtor's insolvency, or of his intention of making an assignment, receives the payment and surrenders the evidence of indebtedness, the transaction does not constitute a preference, within the meaning of the assignment law. (43 Ill. App., 499, affirmed. *Illinois Paper Co. v. Northwestern National Bank*, Ill. Sup., 37 N. E., 66.)

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## VALID PREFERENCES—continued.

- 9 (Mo. Sup., 1894). A corporation in failing circumstances may, by conveyance, prefer one creditor to another in discharging its obligations, if such preference is made in good faith, while the property of the company remains in its possession, unaffected by liens or by process of law. (*Alberger v. National Bank of Commerce*, Mo. Sup., 27 S. W., 657; 123 Mo., 313.)
- 10 (Mo. Sup., 1894). A conveyance of property by a corporation in failing circumstances to discharge its obligations, though constituting a preference, is not rendered fraudulent because the amount of property conveyed largely exceeds the debt thereby preferred. (*Ib.*)
- 11 (Mo. Sup., 1894). A conveyance of property by a corporation in failing circumstances to discharge its obligations, though constituting a preference, is not invalidated by general assignment made the same day. (*Ib.*)
- 12 (N. Y.). In an action by the receiver of a national bank to recover back payments alleged to have been made by the bank in violation of the provision of the national banking act (section 5242), declaring void all transfers of securities and payments made by a bank organized under it, "after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets," as prescribed by the act, these facts were found: Defendant held three certificates of deposit issued by the bank, drawing 6 per cent interest; its cashier, for the reason alleged by him that the directors did not like his paying so large a rate of interest, voluntarily paid two of them, mostly by transferring to defendant negotiable paper. The third certificate was paid on presentation. The bank at the time of these payments was, in fact, insolvent and had been for years, but this was known only to the cashier; it was in good credit and had committed no act of insolvency, and paid all its obligations as they became due or were demanded for six weeks after the last of said payments was made: *Held*, that the complaint was properly dismissed, as plaintiff failed to show that the payments were made in contemplation of insolvency, or to prevent the application of the bank's assets as prescribed by the act. (*Hayes, Receiver, v. Beardsley*, 136 N. Y., 299.)
- 13 (N. Y.). The insolvency of the bank was so concealed by the cashier that none of its directors had any suspicion thereof, and it was not discovered by the bank examiner: *Held*, that under the circumstances the fact that defendant was a director did not as a matter of law charge him with liability for the payments made to him; that, it having been found that he acted in good faith and in ignorance of any wrongdoing or of the bank's insolvency, payments made to him were to be tested under said provisions like payments made to other creditors. (*Ib.*)

*When sale of drafts after insolvency not a preference.*

- 14 (N. J. Eq., 1884). Baldwin, one of the executors and the general financial manager and custodian of the securities of an estate and also the cashier of a national bank, purchased four accepted bills of exchange. To pay for them he drew his check as executor on the deposit in the bank to the credit of the estate, and placed in the box containing the papers of the estate, usually kept in the cashier's desk in the bank, the drafts with this memorandum attached: "Est. W. James, loan \$25,000, Oct. 26th, 1881, C. Nugent & Co." The proceeds of the drafts were applied to the drawer's indebtedness to the bank. The bank failed and the defendant was appointed receiver. He gave to the executors the box and all its contents except the drafts, which he kept, claiming that they were the assets of the bank. He refused to deliver them on demand, and collected them at maturity, but kept the proceeds separate. *Held*, that Baldwin, in the purchase of the drafts,

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## VALID PREFERENCES—continued.

acted as agent of the drawers and as executor and not as cashier, and though Baldwin knew at the time that the bank was insolvent, yet the transaction being a bona fide purchase and not a plan to secure preference of the estate over other depositors, was not in violation of section 5242 of the Revised Statutes of the United States, which forbids the transfer of any bills of exchange, etc., owing to any national bank \* \* \* after the commission of any act of insolvency or in contemplation thereof; and further, that this court has jurisdiction to follow the proceeds of the drafts as trust property so long as they are identifiable, and to decree their payment to the estate. (*Tuttle v. Frelinghuysen*, 38 N. J. Eq., 12; 3 National Banking Cases, 576.)

*When remittances made in regular course of business not preferences—Checks and remittances sent by mail are delivered when the letters containing them are deposited in the post-office.*

- 15 (U. S. Sup. Ct., 1899). The several payments and remittances made to the Chemical Bank by the Capital Bank before its insolvency were not made in contemplation of insolvency, or with a view to prefer the Chemical Bank. These checks and remittances were not casual, but were plainly made under a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital Bank, but were to be credited to its constantly overdrawn account; and when letters containing them were deposited in the post-office, such mailing was a delivery to the Chemical Bank, whose property therein was not destroyed or impaired by the insolvency of the Capital Bank, taking place after the mailing and before the delivery of the letters containing the remittances. (*McDonald, receiver, v. Chemical National Bank*, 174 U. S., 610.)

*When special deposit a preferred claim.*

- 16 (U. S. C. C., 1897). Money deposited in one bank to the account of another, with directions to the latter to pay the amount thereof by telegram to a third bank, is a specific deposit, which may be recovered in full, as against general creditors, where the bank to whose credit the money is deposited receives the same, but suspends before making payment as directed. (*Montagu et al. v. Pacific Bank et al.*, 81 Fed. Rep., 602.)
- 17 (U. S. C. C., 1894). When an indorser pays a note to a bank, and takes a receipt containing an order for a surrender of the note on return of the receipt, the relation between the bank and the indorser is not that of debtor and creditor, but it is a fiduciary relation, entitling the indorser, on the bank becoming insolvent without applying the money on the note or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof. (*Massey v. Fisher*, 62 Fed. Rep., 958.)
- 18 (Cal., 1896). Plaintiff, under an agreement with the bank, deposited with it \$2,000 to secure the bank and the sureties it might procure from liability as bail, and received a receipt reciting the deposit, and that it was payable on return of the certificate and release from liability on bail bond. The money, without the consent of plaintiff, went into the bank vault through the regular channels. *Held*, that the deposit was special, and therefore, on the insolvency of the bank, plaintiff did not stand merely in the same position as the general creditors of the bank. (*Anderson v. Pacific Bank, Cal.*, 44 P., 1063; 112 Cal., 598.)
- 19 (Nebr.). A fund coming into possession of a bank, with respect to which the bank has but a single duty to perform, which is to deliver it to the person entitled thereto, is a trust fund incapable of being commingled with general assets of the bank afterwards transferred to a receiver. (*Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Nebr., 786; 69 N. W. Rep., 115.)

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## WHEN CLEARING HOUSE MAY RETAIN BANK'S PAPER.

- 1 (U. S. Sup. Ct., 1897). Where by a special agreement the clearing house was permitted to retain the paper of a bank each day until it settled its balance with the clearing house for that day, the clearing house is entitled, up to notice of insolvency, to set off the due bills for balances in clearings of the preceding days against the proceeds of the collections in its hands, but can not (it not being included in said special agreement) set off the amount due from the bank for loan certificates, as that would be a preference within the prohibition of Revised Statutes 5242. (*Yardley v. Philler*, 167 U. S., 344.)

## INVALID PREFERENCES.

*Preference of officers not allowed.*

- 1 (Wis., 1899). Where a savings bank, although it has officers of its own, is exclusively managed by the officers of a national bank to which it is indebted, a transfer of collaterals and money from the savings bank to the national bank when the former is insolvent and on the verge of suspension, is an illegal preference of the de facto officers of a corporation. (*Slack v. Northwestern Nat. Bank of Superior*, 2 Banking Cases, 66; 103 Wis., 57.)

*Bank's indemnity to its sureties on attachment bond void.*

- 2 (U. S. Sup. Ct., 1888). No attachment can issue from a circuit court of the United States in an action against a national bank before final judgment in the cause; and if such an attachment is made on mesne process and is then dissolved by means of a bond, with sureties conditioned to pay to plaintiff the judgment which he may recover, the bond is void, and the sureties are under no liability to plaintiff. If the sureties have received assets of the bank to indemnify them against loss (the bank having passed into the hands of a receiver), the receiver may maintain a bill in equity to discharge the sureties and to compel them to transfer their collateral to him. (*Pacific National Bank v. Mixter*, 124 U. S., 721; *Butler v. Coleman*, id.)

*What forbidden after insolvency by section 5242, Revised Statutes.*

- 3 (U. S. Sup. Ct., 1889). The meaning of section 5242 is not different from the meaning of section 52 of the act of June 3, 1864, c. 106, 13 Stat., 115. (*National Security Bank v. Butler*, 129 U. S., 223.)
- 4 (U. S. Sup. Ct., 1889). It is sufficient, under section 5242, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view on the part of the bank to prevent the application of its assets in the manner prescribed by chapter 4 of title 62 of the Revised Statutes, or with a view on its part to the preference of one creditor to another; and it is not necessary to such invalidity that there should be such view on the part of the creditor in receiving the transfer, or any knowledge or suspicion on his part at the time, that the debtor is insolvent or contemplates insolvency. (Ib.)

*Void when given in contemplation of insolvency.*

- 5 (U. S. C. C., 1874). To make transfers, assignments, etc., void under section 52, it is only necessary that the insolvency should be in the contemplation of the bank making transfers; the parties receiving the transfers need not know of or contemplate such insolvency. (*Case v. Citizens' Bank of Louisiana*, 2 Woods, 23; 1 National Banking Cases, 276.)

*When given to postpone contemplated failure.*

- 6 (U. S. C. C., 1885). Where property is transferred by a bank to a creditor to avoid paying him the amount due him, and thus postpone the failure of the bank, it is none the less fraudulent and void. (*Roberts, receiver, etc., v. Hill, administrator, etc.*, 24 Fed. Rep., 571.)

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## INVALID PREFERENCES—continued.

*Possession is the essence of a pledge; and without it, no privilege can exist as against third persons.*

- 7 (U. S. Sup. Ct., 1877). The thing pledged may be in the temporary possession of the pledger as special bailee, without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession, and has always been subject to his disposal by way of collection, sale, substitution, or exchange, no pledge or privilege exists as against third persons. Where it was agreed that a bank should deposit bills and notes with its president and his partner, by way of pledge to secure a loan made by a third party, and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana. (Justices Swayne, Field, and Harlan dissented.) (Casey v. Cavaroc, 96 U. S. Rep., 467.)

## RIGHTS OF PERSONS MAKING DEPOSITS AFTER INSOLVENCY.

*When a deposit may be recovered.*

- 1 (U. S. Sup. Ct., 1890). When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can redeem them or their proceeds; and the pleadings in this case are so framed as to give the plaintiff in error the benefit of this principle. (St. Louis and San Francisco Railway Company v. Johnston, 133 U. S., 566.)
- 2 (U. S. C. C., 1892). Certain checks marked "For deposit" were deposited in a bank at a quarter to 3 on Saturday, and credit was immediately given for the amount thereof on the pass book. The bank closed at 3, and the next day was declared insolvent, with the checks still in its hands. It was the bank's custom, at the close of each day's business, to balance its books, crediting depositors with the amount of their checks, and if a check was subsequently returned unpaid from the clearing house it was charged off to the depositors. The depositor in this instance did not know of this custom. He had made deposits with the bank for several years without any special arrangement, and had never drawn against uncollected checks, except by particular understanding. *Held*, that on these facts title had passed to the bank so as to create the relation of debtor and creditor. (City of Somerville v. Beal, receiver, 49 Fed. Rep., 790; affirmed in 50 Fed. Rep., 647.)
- 3 (U. S. C. C., 1892). But where the foregoing facts were alleged in the bill, and connected with the further allegation that at the time the checks were received the bank was "irretrievably insolvent, and made so by the operations of the president and two others of the directors," and that the depositor then believed it to be solvent and had no means of knowing of its insolvency, this was sufficient to show fraud and to render the bank liable to return the checks or their proceeds. (Ib.)
- 4 (U. S. C. C., 1892). It was not necessary for the bill to specifically allege that the officers of the bank had knowledge of its insolvency, since such knowledge would be implied from the allegation that the insolvency was caused by the president and two directors. (Ib.)
- 5 (U. S. C. C. A., 1892). A city treasurer deposited checks in a bank, indorsed by him "For deposit," and the checks were immediately credited to him on his pass book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## RIGHTS OF PERSONS MAKING DEPOSITS AFTER INSOLVENCY—continued.

- as cash or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver. *Held*, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds. (*Beal, Receiver, v. City of Somerville*, 50 Fed. Rep., 647.)
- 6 (U. S. C. C., 1894). Where money and checks are unsuspectingly deposited in a bank which is known by its managing officer to be hopelessly insolvent a few minutes before closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds. (*Wasson v. Hawkins*, 59 Fed. Rep., 233.)
  - 7 (U. S. C. C., 1888). Where plaintiff deposits money with the receiving teller of a bank a few minutes before the bank closes its doors, to be credited to his account, and the teller, not knowing of the coming failure, after crediting the money in the plaintiff's pass book, puts the money and deposit ticket one side, and before entry is made in the books of the bank it closes its doors, and the money is by order of the directors placed apart, and in that condition delivered to the receiver, plaintiff can maintain replevin for the moneys so deposited. (*Furber v. Stephens*, 35 Fed. Rep., 17.)
  - 8 (U. S. C. C., 1896). The title to funds deposited in an insolvent national bank before banking hours, where the bank was taken in charge by the examiner before the time for opening arrived and was not thereafter opened for business, *held* to have remained in the depositor, and the funds to be recoverable by him from the receiver. (*City of Philadelphia v. Eckels*, 98 Fed. Rep., 485.)
  - 9 (U. S. C. C., 1899). Where a clearing house collected checks and drafts for an insolvent national bank on the day it had been closed by the Comptroller, and from the proceeds paid the balances due from the bank, leaving a balance to its credit, such balance must be presumed to include the proceeds of paper which had been deposited in the bank, and the title to which still remained in the depositors. (*City of Philadelphia v. Aldrich*, 98 Fed. Rep., 487.)
  - 10 (U. S. C. C. A., 1900). It is not essential to the right of a depositor to recover from the receiver of an insolvent bank money deposited after it was known by its officers to be insolvent that he should be able to trace the identical money, but it is sufficient if the money which came into the receiver's hands was increased by the amount of the deposit. (*Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. Rep., 780.)
  - 11 (U. S. C. C. A., 1900). When a bank receives a deposit after hopeless insolvency, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise and prevents the money deposited from becoming the property of the bank and a trust is the equitable result. (*Ib.*)
  - 12 (U. S. C. C. A., 1898). Defendant deposited in bank a draft drawn on its New York correspondent, having theretofore slightly overdrawn its account. The draft was passed to defendant's credit and checked against. On suspension of the bank defendant stopped payment of the draft by telegram, whereupon plaintiff sued as receiver to recover on the draft. *Held*, that he was entitled to recover only the amount due the bank after charging back the draft. (*Stapylton v. Cie. des Phosphates de France*, 88 Fed. Rep., 53.)
  - 13 (U. S. C. C. A., 1900). Money deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, and may be recovered by him

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## RIGHTS OF PERSONS MAKING DEPOSITS AFTER INSOLVENCY—continued.

from the receiver where it is shown that it went to increase the sum which came into his hands. (*Richardson v. New Orleans Coffee Co.*, 102 Fed. Rep., 785; 2 B. C., 522.)

- 14 (U. S. C. C. A., 1900). The right of a depositor to recover a deposit made on the day a bank closed its doors was not affected by the sale by the bank to him on the same day of drafts which were not paid, and for which he gave checks covering the amount deposited. (Ib.)
- 15 U. S. C. C., 1895). A depositor is entitled to a preference where the deposit was made when the bank was hopelessly insolvent, which fact was concealed by the bank; and an equal amount may be recovered from the receiver, who has received the specific money among the general mass of the bank's funds. (*Lake Erie and Western Railroad Company v. Indianapolis National Bank*, 65 Fed. Rep., 690.)
- 16 (N. Y.). Plaintiffs deposited, in the usual course of business, certain drafts with a national bank, which were credited to them on the books of the bank and in their pass book. The bank was at the time irretrievably insolvent, and its drafts had gone to protest the day before; of this its president, to whom was intrusted its entire control and management, had full knowledge, and presumably its other officers and agents. The bank kept open until the usual hour of closing on the day of the deposit, but did not open its doors thereafter, and went into the hands of a receiver. In an action to recover the deposit, *held*, that in permitting plaintiffs to make it, in reliance upon the supposed solvency of the bank, a gross fraud was practiced upon the plaintiffs, and they were entitled to reclaim the drafts or their proceeds. Also, that the right of plaintiffs to make the reclamation was not precluded by the provisions of Revised Statutes, sections 5234 and 5242, forbidding all preferential payment or transfers by an insolvent bank and providing for a ratable distribution of its assets, as plaintiffs did not claim under a transfer from the bank, but under their original title, that their relation as creditors terminated when they elected to rescind the contract implied when the deposit was made, and they were seeking simply to reclaim their own property, and that neither the receiver nor any creditor of the bank had any equity to have such property applied in payment of its obligations. (*Cragie et al. v. Hadley, Receiver*, 99 N. Y., 131.)
- 17 (N. Y.). It makes no difference if the deposit be money or paper for collection, if the officers knew the bank to be insolvent a trust results. (*Importers and Traders' Bank v. Peters*, 123 N. Y., 272.)

*When a deposit made after insolvency may not be recovered.*

- 18 (U. S. C. C., 1899). One who made a general deposit in a bank can not recover such deposit from a receiver on the grounds that the bank was insolvent and known to be so by its officers when the deposit was made, and that the fraud authorized him to rescind the contract, unless the money deposited can be identified in the hands of the receiver, or it appears that the funds coming into his hands were increased by that amount. (*Quin v. Earle*, 95 Fed. Rep., 728.)
- 19 (U. S. C. C., 1899). To constitute fraud on the part of a bank in receiving a deposit when insolvent, which will authorize the depositor to rescind the contract and recover the deposit from a receiver subsequently appointed, the officers must have known or believed the bank to be insolvent at the time the deposit was received, and such knowledge can not be presumed, but must be proved. The fact that they knew it to be in an embarrassed condition is insufficient to establish the fraud. (Ib.)
- 20 (N. Y.). A deposit made in the usual course of business vests in the bank, and can not be recovered by the depositor on the ground of fraud, though the bank was insolvent and failed on the next day,

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## RIGHTS OF PERSONS MAKING DEPOSITS AFTER INSOLVENCY—continued.

and though the deposit was made in reliance on representations of the president that the bank was all right, unless the officers of the bank knew of its insolvency at the time of the deposit. (*New York Breweries Co. v. Higgins*, 29 N. Y. S., 416.)

- 21 (Ohio C. P.). A deposit made in a bank at a time when the officers knew that it was insolvent can not be recovered from the assignee unless it can be identified and traced into his hands. (*In re Commercial Bank (Ct. Insolv.)*, 2 Ohio N. P., 170.)

*When deceived depositor not allowed preference.*

- 22 (Tenn. App., 1895). Where a general depositor presented his check to a bank, accompanied with a demand for payment, but by reason of the false representations of the president as to the solvency of the bank was induced to withdraw said check and to allow his money to remain in the bank, he can not, as a preferred creditor, maintain a bill to recover the amount of said check against a receiver appointed after the bank was declared insolvent. (*Venner v. Cox*, Tenn. Ch. App., 35 S. W., 769.)

## CLAIMS OF SAVINGS BANKS NOT PREFERRED.

- 1 (U. S. Sup. Ct., 1896). The provisions of the New York banking law, that debts due savings banks by an insolvent bank shall be preferred, is in conflict with Revised Statutes, sections 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank. (*Davis v. Elmira Savings Banks*, 16 S. Ct., 502; 161 U. S., 275.)

## DEPOSIT OF COUNTY OR SCHOOL FUNDS.

*When deposit of public funds preferred.*

- 1 (U. S. C. C. A., 1899). A fund deposited with a national bank, which it agreed to hold for the special purpose of paying certain bonds of a school district, and which it could not legally receive as an ordinary deposit or mingle with its own funds, constituted a trust fund, recoverable by the district from its receiver, though it was in fact mingled with the funds of the bank, where a sufficient amount of cash remained on hand at the time the bank suspended business and came into the hands of the receiver. (*Merchants' National Bank v. School Dist. N. 8, of Meagher County, Mont.*, 94 Fed. Rep., 705.)
- 2 (U. S. C. C., 1892). Where the treasurer and tax collector of a county, without authority of law, deposit county moneys in a bank, and receive certificates of deposit marked "Special," the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors. (*San Diego County v. California National Bank*, 52 Fed. Rep., 59.)
- 3 (Idaho Sup., 1898). The creditors of an insolvent national bank are not entitled to share pro rata in the public money deposited in such bank. (*State ex rel. Anderson et al. v. Thum*, 1 Banking Cases, 481; 6 Idaho, 323.)
- 4 (Idaho Sup., 1900). Public moneys deposited in a bank in violation of law as trust funds, do not become the property or assets of such bank, and remain trust funds, with title in the true owner, after the appointment of a receiver and the insolvency of the bank. (*State v. Thum*, 55 Pac., 858, affirmed. (*First Nat. Bank of Pocatello v. C. Bunting & Co. et al.*, 2 Banking Cases, 239; 7 Idaho, 27.)



## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## DEPOSIT OF COUNTY OR SCHOOL FUNDS—continued.

- 5 (Idaho Sup., 1900). A county whose funds have been unlawfully deposited in a bank is not estopped from claiming such funds as a trust fund by reason of its treasurer having received a pro rata payment thereon in common with general creditors. (Ib.)

*When deposit of public funds not preferred.*

- 6 (U. S. C. C., 1894). Under Revised Statutes, section 5242, which forbids all preferences among the creditors of insolvent national banks, a county whose money has been deposited by the county treasurer in a national bank that has become insolvent has no superior right over other depositors in the assets of the bank, where it is not shown that the identical funds deposited by the treasurer or the proceeds of such funds have come into the hands of the receiver. (*Spokane County v. Clark*, 61 Fed. Rep., 538.)
- 7 (U. S. C. C., 1894). A county whose funds are deposited in a bank that fails has no preference over other depositors as to the bank assets where the identity of the funds deposited by the county has been lost. *San Diego County v. California National Bank*, 52 Fed. Rep., 59, disapproved. (*Multnomah County et al. v. Oregon National Bank et al.*, 61 Fed. Rep., 912.)
- 8 (U. S. C. C. A., 1898). Where the treasurer of a school district has illegally deposited its funds in a national bank, and they have become intermingled with the general funds of the bank, after the bank has been declared insolvent, no right is conferred upon the district by the statutes of Iowa to priority of payment out of such general funds over other creditors, and a decision to such effect by the supreme court of the State would not be binding upon a Federal court. (*Beard v. Independent District of Pella City*, 1 Banking Cases, 385; 88 Fed. Rep., 375.)
- 9 (U. S. C. C. A., 1898). In order to establish its right to such priority of payment out of the cash fund in the hands of the bank's receiver, the school district must prove that such cash has been augmented by the addition thereto of trust funds belonging to it, and wrongfully deposited by its treasurer, and this is not shown by evidence to the effect that the amount claimed was not actual cash deposited, but was represented by checks drawn on the bank itself against an ordinary account, the amount of each being charged on the bank's books against the drawer and then entered to the credit of the treasurer of the school district. (Ib.)

## CLAIMS OF UNITED STATES.

*Section 3466 does not apply to insolvent national banks.*

- 1 (U. S. Sup. Ct., 1882). Section 3466, which gives the United States a priority for all claims it has against insolvent debtors, does not apply to the case of an insolvent national banking association. (*Cook County National Bank v. United States*, 107 U. S., 445.)

*Claim of United States not preferred.*

- 2 (U. S. Sup. Ct., 1882). The United States Government has no priority over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of national-bank bills, as well as no prior claim in the distribution of the bank assets, for the payment of the claims of the Government against such bank, and may not apply the proceeds of such assets to the payment pro tanto of its claim for the postal funds and money-order funds deposited in such bank by the postmaster. (Ib.)

*Offset of the United States.*

- 3 (U. S. Sup. Ct., 1882). Against the proceeds of the bonds deposited to secure circulation the United States can set off no claim, except for money advanced to redeem notes. (Ib.)

## INSOLVENCY AND RECEIVERS—Continued.

## PREFERENCES IN INSOLVENCY—Continued.

## CLAIMS OF UNITED STATES—continued.

- 4 (U. S. Ct. Cls.). And upon the failure of any association its 5 per cent redemption fund can not be retained by the Treasury to pay taxes due to the United States, but the fund passes to the Comptroller as an asset of the association. (*Jackson v. United States*, 20 Ct. Cls., 298.)

## TRANSFER OF SECURITIES AFTER INSOLVENCY PROHIBITED.

- 1 (Ky. Appls., 1901). Where a deposit in bank, made by an insolvent debtor, was applied by the bank to the payment of a note it held against the depositor, in order to prevent the release of a surety in the note, the making of the deposit was a preference within the statute, though there may have been no intent to prefer, as that was the natural result; and therefore, in an action to have a prior act of preference declared to operate as an assignment, the bank may be required to surrender the money, the facts constituting the deposit an act of preference being alleged and proved. (*Northern Bank of Kentucky v. Farmers' National Bank of Cynthiana et al.*, 63 S. W. Rep., 64; 3 Banking Cases, 564.)
- 2 (Md. Appls., 1900). In an action to have certain payments made by the defendant bank declared fraudulent preferences, it appeared that the bank, when such payments were made, had been insolvent for years, and was hopelessly insolvent at the time of the payments, or immediately following thereupon. *Held*, that it must be concluded that the payments were made when the bank was insolvent and about to close its doors, and when its officers were chargeable with notice of its condition. (*James Clark Co. et al. v. Colton et al.*, 2 Banking Cases, 530; 91 Md., 195.)
- 3 (N. Y. Sup., 1898). A director of the M. S. bank, who was also the president of a bridge company, when he had acquired as such director the knowledge that such bank was in imminent danger of insolvency and would be closed the following day, and that the St. N. bank, as the agent of the M. S. bank at the latter's clearing house, had in its possession a large amount of the latter's securities and was responsible for all checks of the M. S. bank that would be presented at the clearing house on the next morning, signed as president of the bridge company a check upon the M. S. bank for the amount owing by the latter to the bridge company and had it passed through the clearing house on the next day, thereby effecting a transfer of such amount from the M. S. bank to the bridge company. *Held*, that such transfer was an invalid preference under section 48 of the stock-corporation law of New York. (*O'Brien et al. v. East River Bridge Company*, 1 Banking Cases, 615; 36 Hun, 17.)
- 4 (Wash., 1899). When a bank was in fact insolvent and its officers and plaintiffs were chargeable with notice of its condition, the bank, in order to gain an extension of time, pledged a note and mortgage as additional security for the debt due plaintiffs. *Held*, that such transaction was an unlawful preference. (*Burrell et al. v. Bennett*, 1 Banking Cases, 673; 20 Wash., 644.)

## INTEREST ON CLAIMS.

*Interest on claims against receiver.*

- 1 (U. S. Sup. Ct., 1876). The creditors of an insolvent national banking association in the hands of a receiver are entitled to interest on their claims during the period of administration. (*National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S., 437; *White v. Knox*, 111 U. S., 784.)

## INSOLVENCY AND RECEIVERS—Continued.

## INTEREST ON CLAIMS—continued.

- 2 (U. S. Sup. Ct., 1884). A creditor of an insolvent national bank, who establishes his debt by suit and judgment after refusal of Comptroller to allow it, is entitled to share in dividends on debt and interest so established as of day of failure of bank, not for subsequent interest. (*White v. Knox*, 111 U. S., 784.)
- 3 (U. S. Sup. Ct., 1890). A creditor of a national bank is entitled to interest on the amount of his dividend from the time it was declared by a receiver of the bank until paid. (*Armstrong v. American Exchange National Bank*, 133 U. S., 433.)
- 4 (U. S. C. C., 1875). Where a national bank is declared in default by the Comptroller of the Currency, and a receiver is appointed, and a sufficient fund is realized from its assets to pay all claims against it and leave a surplus, the Comptroller should allow interest on the claims during the period of administration before appropriating the surplus to the stockholders of the bank. (*Chemical National Bank v. Bailey*, 12 Blatchford, 480; 1 N. B. C., 260.)
- 5 (U. S. C. C., 1875). An action of assumpsit to recover such interest will not lie against the Comptroller of the Currency or the receiver of the bank, but will lie against the bank. (Ib.)
- 6 (U. S. C. C., 1875). Where a bank has by reason of its own default been placed in the hands of a receiver, a demand of payment by a depositor is no longer a necessary condition precedent to a right of action for the deposit, and the deposit bears interest from the time of such default. (Ib.)
- 7 (U. S. C. C. A., 1899). An order directing payment of interest by the receiver of a national bank from date of judicial demand is erroneous, as funds coming into the hands of a receiver are turned over to the Comptroller and could not earn interest, and any payment of interest would necessarily be taken from some other trust fund, and this particularly where the involved circumstances of the case made it impossible to pay over the amount without investigation and an accounting. (*Richardson v. Louisville Banking Co.*, 94 Fed. Rep., 442.)
- 8 (U. S. C. C. A., 1899). No interest is recoverable against the fund in the hands of the receiver of an insolvent national bank on recovery in a suit to establish a claim against the bank, made necessary solely by the disallowance of the claim by the receiver. The receiver is required to exercise his judgment as to the allowance of claims, and other creditors are not chargeable with interest because of an error on his part. (*Merchants' Nat. Bank v. School Dist. No. 8, of Meagher County, Mont.*, 94 Fed. Rep., 705.)
- 9 (U. S. C. C. A., 1900). In a suit against the receiver of a national bank for money loaned the bank while it was a going concern, it was error to permit plaintiff to recover interest on the loan after the bank's suspension and the appointment of a receiver, since debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes and the amount of all debts computed as of that day. (*American Nat. Bank v. Williams*, 101 Fed. Rep., 943.)
- 10 (Mont. Sup., 1899). It would be an injustice to other creditors to allow one creditor interest for the time his claim was withheld by the receiver in order to obtain instructions as to his duty in the premises. (*Guignon v. First Nat. Bank of Helena et al.*, 1 Banking Cases, 290; 22 Mont., 140.)

*When depositor's account begins to bear interest.*

- 11 (U. S. Sup. Ct., 1887). In case of book accounts in favor of depositors, interest begins to run against an association in liquidation from the date of the suspension of business. (*Richmond v. Irons*, 121 U. S., 27.)

## INSOLVENCY AND RECEIVERS—Continued.

## INTEREST ON CLAIMS—continued.

- 12 (Ky. Appeals, 1901). In an action against a bank to recover deposits, the balance found due plaintiff should bear interest from the institution of his action. (*Bobb v. Savings Bank of Louisville et al.*, 64 S. W. Rep., 494.)

*When no interest allowed on dividends.*

- 13 (U. S. C. C. A., 1893). Interest on dividends should not be allowed in favor of one who voluntarily delayed presenting his claim until long after the dividends were declared, although the delay was due to a mistaken belief that he had a right to pay his claim in full from collaterals in his hands. (*Chemical National Bank v. Armstrong*, 59 Fed. Rep., 372.)
- 14 (U. S. C. C. A., 1893). The refusal of a creditor to accept the receiver's offer to allow part of a claim without prejudice to a suit for allowance of the remainder, or to the receiver's right to still further reduce the claim if the court should hold such reduction proper, bars the creditor's right to interest on subsequent dividends on the part offered to be allowed, although it is subsequently adjudged that the whole of his claim should have been allowed; but he is entitled to interest on the dividends on the part rejected. (Ib.)

*When receiver's offer to allow claim is deemed withdrawn.*

- 15 (U. S. C. C. A., 1895). Where the receiver of an insolvent bank withdraws his offer to allow part of a claim by filing a pleading in the proceedings denying the liability of the bank on the claim, the interest on dividends should be allowed the owner of claim as though no such offer had been made. (*Chemical National Bank v. Armstrong*, 65 Fed. Rep., 573, modifying 59 Fed. Rep., 372.)

## DISTRIBUTION OF ASSETS.

*What claims recognized by Comptroller.*

- 1 (U. S. Sup. Ct., 1884). The only claims the Comptroller can recognize in the settlement of the affairs of an insolvent national bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to be valid claims against the bank; and he must take the value of the claim at that time, and not at the time judgment is rendered upon it, as the basis of distribution. (*White v. Knox*, 111 U. S., 784.)

*Rules of distribution in bankruptcy not applicable.*

- 2 (U. S. Sup. Ct., 1882). The priorities and method of distribution under the bankruptcy law have no application to the winding up of insolvent national banks. Everything essential to the formation of banks, \* \* \* the winding up of the institutions, and the distribution of their effects are fully provided for as in a separate code by itself, neither limited or enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates. (*Cook County Nat. Bank v. United States*, 107 U. S., 445; 2 Sup. Ct., 561.)

*Basis on which dividends are paid to secured creditor.*

- 3 (U. S. Sup. Ct.). A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full.

(U. S. Sup. Ct., 1899) *Merrill v. National Bank of Jacksonville*, 173 U. S., 131;

(U. S. Sup. Ct., 1900) *Aldrich, receiver, v. Chemical National Bank*, 2 B. C., 446; 176 U. S., 618.

INSOLVENCY AND RECEIVERS—Continued.

DISTRIBUTION OF ASSETS—continued.

*When creditor not entitled to share in distribution of assets obtained by assessing shareholders.*

- 4 (U. S. Sup. Ct.). After the bank went into voluntary liquidation several creditors took in payment of their claims paper belonging to the bank indorsed and guaranteed in the name of the bank by its president, which paper was not paid. *Held*, that such creditors were not entitled to distribution of the assets obtained by enforcement of the statutory liability of the stockholders, as the original debt was paid and the stockholders, in the absence of express authorization, are not liable on the contract of indorsement or guarantee, made after suspension.

(U. S. Sup. Ct., 1887) *Richmond v. Irons*, 121 U. S. 27;

(U. S. Sup. Ct., 1890) *Schrader v. Manufacturers' National Bank*, 133 U. S., 67.

*National banks—Distribution of assets in insolvency—Holders of outstanding drafts.*

- 5 (U. S. C. C. A., 1903). When a national bank has been placed in the hands of a receiver as insolvent, the Federal law becomes from that moment the law of the distribution of its assets, to the exclusion of the law of any State; and a second bank, which holds a deposit of funds of the insolvent bank, against which the latter has drawn drafts which have not been paid, can not pay the same after notice, and set up the payment as a defense to an action by the receiver to recover the deposit, although by the law of the State in which the second bank is located a draft or check is held to be an assignment pro tanto of the fund on which it is drawn; since by the Federal law it is not such an assignment as entitles the holder to a preference over the other creditors when the drawer has become insolvent before payment. (*First National Bank of Chicago v. Selden*, 120 Fed Rep., 212.)

*Disposition of assets.*

- 6 (Md., 1901). An order finally confirming an auditor's account in a receivership, ascertaining a balance for distribution, to which no exception is filed, is, in effect, an adjudication in rem, and the distributions are res adjudicata. (*Rogers et al. v. Citizens' Nat. Bank of Baltimore et al.*, 4 Banking Cases, 69; 93 Md., 613.)

INTEREST AND USURY.

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## WHAT LAW GOVERNS—APPLICATION OF STATE LAW.

*Laws of what State control.*

- The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance the parties may lawfully contract in that case also for the higher rate. These rules are subject to the qualification that the parties act in good faith and that form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere.  
 (U. S. Sup. Ct., 1867) *Miller v. Tiffany*, 68 U. S., 298, quoting :  
 ——— *Andrews v. Pond*, 13 Peters, 77-78;  
 ——— *Curtis et al. v. Leavitt*, 15 New York, 92;  
 ——— *Berrien v. Wright*, 26 Barbour, 213;  
 ——— *Depeau v. Humphrey*, 20 Howard, 1;  
 ——— *Chapman v. Robinson*, 6 Paige, 634;  
 ——— *Mix et al. v. The Madison Ins. Co.*, 11 Ind., 117;  
 ——— *Corcoran & Riggs v. Powers et al.*, 6 Ohio St., 19;  
 (U. S. Sup. Ct., 1876) *Cockle v. Flack*, 93 U. S., 344;  
 (U. S. Sup. Ct., 1877) *Cromwell v. Sac. Co.*, 96 U. S., 51.
- The laws of the State in which the note is made payable and is to be used determines the lawfulness of the rate.  
 (U. S. C. C.) *Bank of Alexandria v. Mandeville*, 1 Cranch C. C., 552;  
 (Md.) *Billingsley v. State Bank*, 3 Md., 375;  
 (Me.) *Lumbermen's Bank v. Bearce*, 41 Me., 505;  
 (Wis.) *Dukie v. City Bank*, 13 Wis., 216.
- (U. S. Sup. Ct., 1874). A draft drawn in Illinois and accepted by parties residing in New York and then sent to Illinois to be negotiated is an Illinois contract and is governed by the usury laws of Illinois, although the draft is payable in New York. (*Tilden v. Blair*, 88 U. S., 241.)
- (U. S. C. C. A., 1899). Where a note executed in one State is made payable in another, under the laws of which it is not usurious, while it is

## INTEREST AND USURY—Continued.

## WHAT LAW GOVERNS—APPLICATION OF STATE LAW—continued.

usurious under the law of the State where made, the law of the State of performance will govern as to usury. (*Dygert et ux. v. Vermont Loan and Trust Co.*, 94 Fed. Rep., 913.)

- 5 (U. S. C. C. A., 1899). The question whether a promissory note is governed, as to usury, by the law of the State where it was executed and in which suit is brought, or of the State in which it is made payable, in the absence of a State statute on the subject, is one of general law, upon which a Federal court is not bound to follow the decision of the supreme court of the State. (*Ib.*)
- 6 (U. S. C. C. A., 1894). A note made in one State and payable in another, if valid where made, is not rendered invalid because it contravenes the usury laws of the State in which it is payable. (*Sturdivant v. Memphis National Bank*, 60 Fed. Rep., 730; *ib.*, 736.)
- 7 (U. S. C. C. A., 1893). A note dated and signed by the makers in Tennessee and payable in Chicago, Ill., and forwarded by them to the payees in Chicago, to be used by the latter in raising money with which to pay off a prior note made by the same parties, actually used in Chicago for that purpose, must be held an Illinois contract and governed by the laws of Illinois relating to usury. (*Buchanan et al. v. Drovers' National Bank of Chicago*, 55 Fed. Rep., 223.)

## WHAT CONSTITUTES USURY.

*Requisites to form an usurious transaction.*

- 1 (U. S. Sup. Ct., 1830). The requisites to form an usurious transaction are: First, A loan, either express or implied; second, an understanding that the money lent shall or may be returned; third, that a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done is an important ingredient to constitute this offense. An ignorance of the law will not protect a party from the penalties of usury where it is committed; but where there was no intention to evade the law, and the facts, which amount to usury, whether they appear upon the face of contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches. (*Lloyd v. Scott*, 29 U. S., 205.)

*What constitutes payment within meaning of section 5198.*

- 2 (U. S. Sup. Ct., 1905). The payment referred to in section 5198 Revised Statutes is an actual payment and not a further promise to pay and the mere discharge of a maker of a note by his giving his own note in renewal thereof will not uphold a recovery against the bank on account of usurious interest in the former note. (*First National Bank of Jacksboro v. Lasater*, 196 U. S., 115.)

*When interest usurious although the total interest amounts to less than the maximum rate permitted by the State.*

- 3 (U. S. Sup. Ct., 1904). Under sections 5197–5198, U. S. Revised Statutes, a national bank which compounds interest in a manner prohibited by the State forfeits all interest even though the total interest amounts to less than the maximum rate permitted by the State. (*Citizen's National Bank of Kansas City v. Donnell*, 195 U. S., 369.)

*Discount at higher rate than is legal is usury.*

4. The discounting of business paper by a national banking association at a higher than the legal rate is usurious, though the law of the State fixes no limit to the rate which natural persons may take for the discount or purchase of such paper.

(U. S. Sup. Ct., 1881) *National Bank of Gloversville v. Johnson*, 104 U. S., 271;

(N. Y.) *Johnson v. National Bank of Gloversville*, 74 N. Y., 329.

- 5 (U. S. C. C. A., 1896). The purchase of accepted drafts by a national bank from the holder without his indorsement at a greater reduction

## INTEREST AND USURY—Continued.

## WHAT CONSTITUTES USURY—continued.

than lawful interest on their face value is a discounting of those drafts within the meaning of Revised Statutes, section 5197, which prohibits such bank from taking interest on any loan or discount made by it at a greater rate than is allowed by the laws of the State where it is situated. (*Danforth et al. v. National State Bank of Elizabeth*, 48 Fed. Rep., 271.)

*More than legal interest on overdrafts is usury.*

- 6 (Pa.). By charging more than legal interest on overdrafts a national banking association loses the right to recover any interest at all. (*Third National Bank of Philadelphia v. Miller*, 90 Penn. St., 241.)

*When interest on overdraft not usury.*

- 7 (U. S. C. C., 1890). Where drafts are from time to time deposited in a bank, some of them being payable on demand and some on time, an agreement between the bank and the depositor that credit shall be given for such drafts on the day after their deposit, the depositor being charged the full legal rate for any overdraft, does not constitute usury when such agreement is made in good faith in order to save involved calculations. (*Timberlake et al. v. First National Bank*, 43 Fed. Rep., 231.)
- 8 (U. S. C. C., 1890). Charging a depositor, by agreement, at the end of each month with interest at the full legal rate on his overdraft and adding such charge to the overdraft does not constitute usury. (Ib.)

*When commission in addition to interest is usury.*

- 9 (Ill., 1893). Bank loaned money upon note which it afterwards discounted, the maker agreeing to open account with bank or to pay 2½ per cent commission to the bank on the loan. As the money loaned belonged to the bank, commission held to be usury. (*Union National Bank of Chicago v. L. N. A. and C. Rwy. Co.*, Ill. Supreme Court, May 9, 1893, 34 N. E., 135; 145 Ill., 208.)

*Agreement in mortgage for illegal interest on notes secured.*

- 10 (Ky. Ct. App., 1888). An agreement to pay illegal interest in a mortgage given to secure the notes after maturity forfeits both legal and illegal interest, though no interest is expressed in the notes themselves. (*Alves v. Henderson National Bank*, 3 N. B. C., 452; 89 Ky., 126.)

*Stipulation for attorney's fee usurious.*

- 11 (U. S. C. C., 1882). A provision in a promissory note "to pay an attorney's fee of 10 per cent on the amount due if suit is brought to enforce payment, for use of the attorney bringing the suit," is a stipulation for a penalty or forfeiture, and tends to the oppression of the debtor; is a cover for usury, and is without consideration and contrary to public policy, and void. (*Merchants' National Bank v. Sevier et al.*, 14 Fed. Rep., 662.)
- 12 (U. S. C. C., 1882). Such a stipulation in a note discounted by a national bank is void for the further reason that it is in excess of the power of the bank under its charter. (Ib.)

*Contra.*

- 13 (Ga.). A contract to pay attorney's fees for collecting, in addition to principal and interest, is not, on its face, usurious; nor does it become usurious by reducing the debt to judgment and including in the judgment 10 per cent for attorney's fees. (*National Bank of Athens v. Danforth*, Ga., 7 S. E. Rep., 546; 80 Ga., 55.)

*Interest charged all that is regarded illegal.*

- 14 (U. S. Sup. Ct., 1902). In these statutes relating to illegal interest, it is the interest charged, and not the interest to which a forfeiture might be enforced, that the statute regards as illegal; and if interest greater than the legal rate is charged, it may be relinquished, and



## INTEREST AND USURY—Continued.

## WHAT CONSTITUTES USURY—continued.

recovery had of the legal rate. (*Talbot v. Sioux City First National Bank*, 185 U. S., 172.)

*When bank can not elect to remit excessive interest.*

- 15 (U. S. Sup. Ct., 1904). A national bank met in an action by the plea of usury may not avoid the forfeiture of all interest by then declaring an election to remit the excessive interest. (*Citizens' National Bank of Kansas City v. Donnell*, 195 U. S., 369.)

## TRANSACTIONS NOT USURIOUS.

- 1 (U. S. Rev. Stat., Sec. 5197). "Interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run, and the purchase discount or sale of a bona fide bill of exchange payable at another place than the place of such purchase, discount, or sale at not more than the current rate of exchange for sight drafts in addition to the interest shall not be considered as taking or receiving a greater rate of interest."
- 2 (U. S. Sup. Ct., 1891). It is settled doctrine in Illinois that the mere taking of interest in advance does not bring a loan within the prohibition against usury; but whether the doctrine would apply where the loan was for such period that the exaction by the lender of interest in advance would at the outset absorb so much of the principal as to leave the borrower very little of the amount agreed to be loaned to him is not decided. (*Fowler v. Equitable Trust Co.*, 141 U. S., 384.)
- 3 (N. Y. Sup.). C., whose business was lending money and indorsing paper, had an arrangement with plaintiff bank by which it was to discount all notes bearing her indorsement, for the benefit of the maker; the proceeds to be drawn by "discount checks" signed by the maker, plaintiff being furnished by C. with collateral security to indemnify it. Defendant made application to C. for a loan of \$50 for three months, and C. offered, as testified by defendant, to make the loan, or, as testified by C., to lend C.'s credit for \$10. A note for \$60, signed by defendant, payable to and indorsed by C., was discounted by plaintiff, and the proceeds, less the legal discount, placed to defendant's credit, and immediately withdrawn on his discount check, he thereupon paying \$10 to C.'s agent. *Held*, that whether the transaction was a cover for usury to plaintiff's knowledge, was a question for the jury. (*Flour City National Bank v. Miller*, 38 N. Y. S., 503.)

*Transactions held not to be usurious.*

- 4 (Iowa, 1898). Usurious interest is not paid a national bank by sale of the mortgaged lands so as to authorize recovery back of same, under Revised Statutes United States, section 5198, where the same is embraced in a note, and the debtor then gives bonds secured by trust deed therefor and in action to foreclose, usury is set up, and the amount thereof deducted by the judgment from the amount due on the bonds. (*Talbot v. First Nat. Bank of Sioux City*, 76 N. W., 726; 106 Iowa, 361, 1898.)

## STATE USURY LAWS INAPPLICABLE TO NATIONAL BANKS.

1. The usury laws of the State do not apply to national banking associations.
  - (U. S. Sup. Ct., 1875) *Farmers and Mechanics' Bank v. Dearing*, 91 U. S., 29;
  - (Mass.) *Central National Bank v. Pratt*, 115 Mass., 539;
  - (Mass.) *Davis v. Randall*, 115 Mass., 547;
  - (N. Y.) *Hintermister v. First Nat. Bank*, 64 N. Y., 212;
  - (Ohio) *First National Bank v. Garlinghouse*, 22 Ohio St., 492.

## INTEREST AND USURY—Continued.

## STATE USURY LAWS INAPPLICABLE TO NATIONAL BANKS—continued.

2. And the remedies provided by the State for the taking of usury can not be resorted to.  
(U. S. Sup. Ct.) *Farmers and Mechanics' Bank v. Dearing*, 91 U. S., 29;  
(Ind.) *Wiley v. Starbuck*, 44 Ind., 298.
- 3 (U. S. Sup. Ct., 1903). A claim that usurious interest has been paid on a debt to a national bank, secured by mortgage on real estate given by the debtors to an individual for the benefit of the bank, can not be asserted under the State law in foreclosure proceedings in the State courts. Where usury has been paid to a national bank the remedy afforded by section 5198, Revised Statutes, is exclusive and is confined to an independent action to recover such usurious payments. (*Schuyler Nat. Bank v. Gadsen*, 191 U. S., 451.)
- 4 (Ala., 1894). A State law imposing a penalty on banks exacting usurious discounts does not apply to national banks, the penalty imposed on such banks by Federal laws in regard to usurious discounts being exclusive. (*Florence Railroad and Improvement Company v. Chase National Bank*, Ala., 17 So., 720; 106 Ala., 364.)
- 5 (Ala., 1896). Code 1886, section 4140, making it a misdemeanor for any banker to discount commercial paper at a higher rate than 8 per cent per annum, has no application to national banks. (*Slaughter v. First Nat. Bank of Montgomery*, 19 So., 430; 109 Ala., 157.)
- 6 (Ohio Sup., 1872). National banks organized under acts of Congress are not bound by the usury laws of the States in which they are situated. (*The First National Bank of Columbus*, plaintiff in error, *v. Garlinghouse et al.*, 22 Ohio St., 492; 1 N. B. C., 811.)

*State law may not provide additional forfeiture for usury.*

- 7 (U. S. Sup. Ct., 1875). The only forfeiture for usury declared by section 30 of act of 1864 is of entire interest, and no greater loss is incurred by such bank by reason of the usury laws of a State. (*Farmers and Mechanics' National Bank v. Dearing*, 91 U. S., 29.)
- 8 (Ga. Sup., 1900). The penalty imposed by section 5198, Revised Statutes United States, upon national banks for charging usury is exclusive. The law of this State that a waiver of homestead, when part of a usurious contract, is void, imposes a penalty for charging usury, and is, therefore, not applicable to national banks. It follows that a surety who signs a promissory note containing a waiver of homestead, and secretly tainted with usury, of which latter fact he had no knowledge at the time of signing, is not discharged from liability when the note is payable to a national bank, as his risk has not been increased. (*First Nat. Bank of Dalton v. McEntire*, 37 S. E. Rep., 381; 3 Banking Cases, 70; 112 Ga., 232.)

## EFFECT OF TAKING USURY ON CONTRACT.

*Usury does not invalidate contract.*

- 1 (U. S. Sup. Ct., 1875). The taking of illegal interest by a national banking association does not render the contract void. (*Farmers and Mechanics' Bank v. Dearing*, 91 U. S., 29.)
2. It does not invalidate an indorsement of the notes upon which the usurious interest was paid.  
(U. S. Sup. Ct., 1879) *Oates v. First National Bank of Montgomery*, 100 U. S., 239;  
(Md.) *Lazear v. National Union Bank of Baltimore*, 52 Md., 78.
- 3 (Ohio Sup., 1872). The reservation of illegal interest by a national bank does not avoid the principal. (*Shinkle v. The First National Bank of Ripley*, 22 Ohio St., 516; 1 N. B. C., 824.)
- 4 (Ohio Sup., 1872). The discounting of a promissory note by a national bank at an unlawful rate of interest does not render the note void in

## INTEREST AND USURY—Continued.

## EFFECT OF TAKING USURY ON CONTRACT—continued.

toto, but only to the extent of the interest. (The First National Bank of Columbus, plaintiff in error, *v. Garlinghouse et al.*, 22 Ohio St., 492; 1 N. B. C., 811.)

- 5 (Ohio Sup., 1872). National banks are authorized to take mortgages on real estate in good faith to secure debts previously contracted. A national bank extended the time of payment of indebtedness at a usurious rate of interest and took therefor notes and a mortgage made by the debtor to a third person, the notes being indorsed by the latter. *Held*, that the usury only avoided the interest, and that to the extent the debt was valid the mortgage was a bona fide security and that the bank by becoming the owner of the notes acquired the equity in the mortgage. (*Allen v. The First Nat. Bank of Xenia*, 22 Ohio St., 97; 1 N. B. C., 828.)

- 6 (Tex., 1896). The fact that a part of the consideration of a note was for usurious interest on a former note does not render the note void in toto. (*First National Bank of Mason v. Ledbetter*, Tex. Civ. App., 34 S. W., 1042.)

*Usury on notes does not invalidate a guaranty of them.*

- 7 (Md. Appls., 1879). A guaranty of negotiable paper discounted by a national bank is not rendered void by the fact that the bank demanded and received usurious interest upon the notes. (*Lazear v. National Union Bank of Baltimore*, 2 N. B. C., 261; 52 Md., 78.)

*Usury does not affect liability by antecedent parties for interest.*

- 8 (Ohio). The liabilities of antecedent parties to a note or bill will not be affected by the usurious character of the transaction between the payee and the association; and the association may recover the full amount of the note or bill from the maker or acceptor. (*Smith v. The Exchange Bank of Pittsburg*, 26 Ohio St., 141.)

*Indorser bank not estopped because it has charged usury.*

- 9 (Pa.). Where a national banking association has discounted notes for another bank at a usurious rate of interest, the fact that the other bank has charged illegal interest on those notes to its customers will not affect its right to set up the defense of usury in an action by the association. (*Third National Bank of Philadelphia v. Miller*, 90 Penn. St., 241.)

*Surety not released by exaction of usury.*

- 10 (Ohio Sup., 1872). The discounting of a note for the principal maker at an unlawful rate of interest is not such an unauthorized use of the note as will discharge the sureties from liability. In the absence of any express agreement or understanding on that subject between the sureties and the principal, of which the holder had notice, or any intention to practice a fraud on the sureties, they must be held to have trusted to the judgment and discretion of the principal as to the terms on which the note might be discounted. (*First Nat. Bank of Columbus v. Garlinghouse*, 22 Ohio St., 492; 1 N. B. C., 811.)

*Penalty may not be pleaded as a defense.*

- 11 (N. Y.). Under the national banking act (13 Stat. L., 99) prescribing a penalty against national banks for taking usury, which can only be collected in an action of debt, a defense of usury can not be set up to defeat a bank's recovery on a note. (*First Nat. Bank v. Anderson*, 67 N. Y. S., 434; 55 App. Div., 570.)

*Effect of usury in note purchased by bank or held by it as collateral.*

- 12 (U. S. Sup. Ct., 1830). Usurious securities where declared void by statute are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. (*Lloyd v. Scott*, 4 Pet. (29 U. S.), 205.)

## INTEREST AND USURY—Continued.

## FORFEITURE OF INTEREST.

*Usury destroys interest-bearing power of note.*

- 1 (Pa., 1895). But usury destroys the interest-bearing power of the obligation; and there will be no point of time from which it can bear interest. (*Lucas v. Government National Bank of Pottsville*, 78 Penn. St., 228; overruled by *Second National Bank of Clarion v. Morgan*, 30 Atl. Rep., 957; 165 Pa. St., 199.)
- 2 (Pa., 1884). Where a national bank takes, receives, or charges more than the legal rate of interest in the discount of a note, the interest-bearing power of the note is destroyed and remains destroyed until it is paid. (*Guthrie v. Reid*, 107 Penn. St., 251; 3 N. B. C., 751.)

*Usury forfeits interest before and after maturity until judgment.*

- 3 (U. S. C. C., 1880). The receipt by a national bank of an usurious rate of interest upon the discount of a note works a forfeiture of such interest as would otherwise have accrued after the maturity of the note. (*The First National Bank of Uniontown v. Stauffer*, 1 Fed. Rep., 187.)
- 4 (U. S. C. C., 1883). Section 5198, Revised Statutes, makes the receiving or charging "a rate of interest greater than is allowed" "a forfeiture of the entire interest." In case a greater rate of interest has been paid the debtor may recover back "twice the amount of interest thus paid." (*Hill v. National Bank of Barre*, 15 Fed. Rep., 432.)
- 5 (Kans., 1894). Where a national bank received usurious interest it forfeits the entire interest on the note, including that accruing after maturity, though the latter rate be lawful. (*Shafer v. First National Bank of Russell*, 36 P., 998; 53 Kans., 614.)
- 6 (Ky. Ct. Appls., 1901). A national bank by contracting for usurious interest forfeits all interest only to the date of bringing suit on the note, and judgment for the principal should bear interest at the legal rate from the date of filing the petition. (*Second Nat. Bank of Richmond v. Fitzpatrick et al.*, 63 S. W. Rep., 459; 3 Banking Cases, 461.)
- 7 (Ky. Appls., 1881). Under act of Congress, June 3, 1864, section 30, providing that national banks knowingly receiving or charging a greater rate of interest than allowed by the State where the bank is located shall forfeit the entire interest which the note carries with it, or which has been agreed to be paid thereon, not only is forfeited a greater sum reserved by the bank out of the money than the legal interest for the time the note has to run, but also the interest accruing by law upon nonpayment after maturity. (*Alves v. Henderson National Bank*, 3 N. B. C., 452; 89 Ky., 126.)
- 8 (Ohio). The usury works a forfeiture of the entire interest accruing after maturity and before judgment, as well as that which accrues before maturity. (*Shunk v. The First National Bank of Galion*, 22 Ohio St., 508.)

*Contra.*

- 9 (Pa., 1887). The taking of usurious interest under section 5197 of the Revised Statutes of the United States and the Pennsylvania act of May 28, 1858, does not prevent the recovery of the lawful interest. (Appeal of *Second National Bank of Titusville*; *Henderson*, to use of *Second National Bank of Titusville v. Waid*, 96 Penn. St., 460; 3 N. B. C., 740.)

*Interest on judgment on usurious note.*

- 10 (Kans. Sup., 1894). A judgment on a note, whereon interest is forfeited because of usury, bears interest at 6 per cent, under General Statutes 1889, paragraph 3500, relating to interest on judgments, though the note provided for lawful interest after maturity. (*Shafer v. First National Bank of Russell*, 36 P., 998; 53 Kans., 614.)

## INTEREST AND USURY—Continued.

## RENEWAL OF USURIOUS NOTE.

*Usury is not purged by settlements and renewals.*

- 1 (U. S. Sup. Ct., 1839). No subsequent confirmation of an usurious contract, nor any new contract, stipulating to pay the debt with the usurious interest will make it valid. (*Moncure v. Dermott*, 38 U. S., 345.)
- 2 (Ark., 1879). The knowingly taking or receiving by a national bank of a greater rate of interest than is lawful in the State where it is located is usurious under the national banking act and the entire interest is forfeited, and the usury is not purged by settlements and renewal notes without additional usury. (*Pickett v. Merchants' National Bank of Memphis*, 32 Ark., 346; 2 N. B. C., 209.)

*Note given for interest partly usurious is without consideration.*

- 3 (Nebr. Sup., 1894). A promissory note given for already accrued interest, in part usurious, was without consideration, and suspension of the right of collection between its date and maturity in no way operated to supply this essential element, otherwise lacking. (*McGhee v. First National Bank of Tobias*, 58 N. W., 537; 40 Nebr., 92.)

## WHAT RATE OF INTEREST MAY BE CHARGED.

*Over 7 per cent usurious when no rate fixed by State law.*

- 1 (U. S. C. C., 1873). In New York the rate of interest which a corporation may pay is not limited. A national bank located in that State loaned money to a corporation at a rate of interest exceeding 7 per cent per annum. *Held*, that the interest on the loan was forfeited under section 30 of the national banking act (13 Stat. L., 108), which provided that when no rate of interest was fixed by the law of a State a national bank might charge a rate not exceeding 7 per cent per annum, and that if it charged more the entire interest should be forfeited. (In re *Wild*, 11 Blatch., 243; 1 N. B. C., 246.)
- 2 (N. Y. Appls., 1878). A national bank discounting business paper at a greater rate than 7 per cent is liable to the forfeiture of double the excess over 7 per cent imposed by the national banking act, although the transaction is not usurious under the State law. (*Johnson v. National Bank of Gloversville*, 74 N. Y., 329; 30 Am. Rep., 302; 2 N. B. C., 302. Affirmed, *Natl. Bank of Gloversville v. Johnson*, 104 U. S., 271.)
- 3 (N. Y.). No privilege of immunity from the usury laws of the States is conferred upon national banks by the act of Congress of 1864 (13 Stat. L., 99), and a contract for a loan made in this State with one of these organizations, by which it reserves a greater rate of interest than 7 per cent is void. (*First National Bank of Whitehall, respondent, v. James Lamb et al., appellants*, 50 N. Y., 95.)
- 4 (N. Y.). The provision of section 30 of said act, limiting the forfeiture to the interest, has reference only to the preceding sentence, which prescribes a rate of interest in those States and Territories where no rate is fixed by law. A construction of this provision which would make it applicable to contracts made in States where the rate of interest is regulated, and which would bring it in conflict with State laws, would render it unconstitutional. (Ib.)
- 5 (N. Y.). The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the Federal Government only carries with it authority to confer upon that corporation such privileges or immunities from State laws as are necessary to enable it to effect the legitimate national object for which it is created. No such national object requires that national banks should exceed the rate of interest fixed by the States, and no immunity from State usury laws is therefore necessary. (Ib.)

## INTEREST AND USURY—Continued.

## WHAT RATE OF INTEREST MAY BE CHARGED—continued.

*When national banks may charge any rate.*

- 6 (Cal.). Where by the statutes of the State parties are authorized to contract for any rate of interest, national banking associations in that State may likewise contract for any rate, and are not limited to 7 per cent. (*Hines v. Marmolejo*, 60 Cal., 229.)
- 7 (Colo., 1894). Under Revised Statutes, section 5197, authorizing national banks to charge any rate of interest allowed by the law of the State wherein such bank is organized, and the statute fixing a legal rate of interest, but permitting the parties to stipulate for any rate of interest, a national bank in Colorado may charge interest at any agreed rate. The restriction contained in the national banking act which forbade national banks to charge more than 7 per cent only became operative in the absence of State legislation. Whenever the State legislature has acted, the general grant of power to banks to charge whatever rate might be reserved either by citizens or banks of issue became operative. (*Rockwell v. Farmers' National Bank of Longmont*, 36 P., 905; 4 Colo. App., 562.)

*Rate of interest chargeable by national banks same as allowed under State laws by individuals or State banks generally.*

- 8 (U. S. Sup. Ct., 1873). The provision in section 30 of the act of 1864, "that where, by the law of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the act," is enabling, and not restrictive; and therefore a national banking association in any State may stipulate for as high a rate of interest as by the laws of such State a natural person may, although State banks of issue are restricted to a less rate. (*Tiffany v. National Bank of the State of Missouri*, 18 Wall., 409.)
- 9 (U. S. Sup. Ct., 1873). Bank may take the rate of interest allowed by the State to natural persons generally, and a higher rate where State banks of issue can take it. (Ib.)
- 10 (U. S. Sup. Ct., 1881). But it is not to be inferred, from *Tiffany v. National Bank of Missouri*, that whatever by the laws of the State is lawful for natural persons in acquiring title to negotiable paper by discount is lawful for national banks. (*National Bank of Gloversville v. Johnson*, 104 U. S., 271.)
- 11 (U. S. Sup. Ct., 1881). May charge rate of interest allowed to natural persons in the State or Territory where bank is located, but can not take more, even on discount of paper for third party, without it being usury. (Ib.)
- 12 (U. S. Sup. Ct., 1900). In the provisions in Revised Statutes, section 5197, that when no rate of interest "is fixed by the laws of the State or Territory, or district," in which a bank is situated, it "may take, receive, reserve, or charge a rate not exceeding 7 per cent," the words "fixed by the laws" must be construed to mean "allowed by the laws." (*Daggs v. Phoenix National Bank*, 177 U. S. Rep., 549.)
- 13 (U. S. C. C., 1879). Under the national banking act, any national bank in Pennsylvania can charge and take the same rate of interest as any State bank of issue is authorized to charge. (*First National Bank of Mount Pleasant v. Tinstman*, 36 Legal Intelligencer, 228; 2 N. B. C., 182.)
14. The interest which a national banking association may charge is limited to the rate allowed to the banks of the State generally; and the fact that a few of the State banks are specially authorized to take a higher rate is not a warrant for a national banking association to do so.
  - (U. S. D. C., 1878) *Duncan v. First National Bank of Mount Pleasant*, 11 Bank Mag., 787; 1 N. B. C., 360;
  - (Pa. Sup., 1879) *First National Bank of Clarion v. Gruber*, 87 Pa. St., 468.

## INTEREST AND USURY—Continued.

## WHAT RATE OF INTEREST MAY BE CHARGED—continued.

- 15 (Ind. Sup., 1873). By the statute of a State, 6 per cent was declared to be the legal rate of interest, but parties were authorized to agree in writing for a higher rate, not exceeding 10 per cent. *Held*, that national banks located in the State could charge 10 per cent. (Wiley v. Starbuck, 1 N. B. C., 436; 44 Ind., 298.)
- 16 (Tex.). The decisions of the United States Supreme Court teach that the statute referred to is to be liberally construed in favor of national banks, and even when the language of the statute would restrict them to a less rate of interest than is allowed to individuals, the intentment of the law must be presumed to have been otherwise. *Tiffany v. National Bank of Missouri* held that the intent of the law was to put national banks on an equal footing with State banks; to allow the State banks to charge any amount of interest and national banks only 8 per cent would violate that intention; to say that national banks could only charge 7 per cent would be to say that the State had prescribed no rate of interest. (*National Bank of Jefferson v. Bruhn & Williams*, 64 Tex., 571.)

*Rate under State laws.*

- 17 (Ala., 1896). Code, 1886, section 4140, making it a misdemeanor for any banker to discount commercial paper at a higher rate than 8 per cent per annum, is not applicable to national banks. (*Slaughter v. First Nat. Bank of Montgomery*, 19 So. Rep., 430; 109 Ala., 157.)
- 18 (Cal., 1895). Revised Statutes of the United States, section 5197, prohibits a national bank from charging a higher rate of interest than the one fixed by the law of the State in which it is located. Civil Code, section 1918, makes a rate of interest greater than the one fixed by law as the legal rate, viz, 7 per cent, valid when agreed to by the parties. *Held*, that a national bank may contract for any rate of interest. (*California Nat. Bank v. Ginty*, 108 Cal., 148; 41 Pac. Rep., 38.)
- 19 (Ky. App., 1876). By the statute of Kentucky no more than 6 per cent interest could be exacted, but parties were allowed to contract and pay 10 per cent "by memorandum in writing, signed by the party chargeable thereon, and not otherwise." A national bank located in the State discounted notes, charging interest in advance at the rate of 10 per cent without other "memorandum in writing" than the notes, wherein was a promise to pay the principal and accrued interest at the rate of 10 per cent. *Held*, that the transaction was not usurious. (*Newell v. Nat. Bank of Somerset*, 1 N. B. C., 501; 12 Bush., 57.)
- 20 (Mo. Sup., 1903). In renewing an indebtedness interest was compounded every six months and included in the new note. *Held*, a violation of the statutes of Missouri providing that interest shall not be compounded oftener than once a year, and of that section of the national banking law which provides that a national bank may charge interest at the rate allowed by the State law and no more. (*Citizens' Nat. Bank v. Donnell*, 5 B. C., 504; 72 S. W., 925.)
- 21 (Ohio Sup., 1894). As act of 1873 (70 Ohio Laws, 178) repeals the statute fixing the rate of interest for banks of issue, a national bank may charge interest at 8 per cent under Revised Statutes, section 3181. (*La Dow v. First National Bank*, 37 N. E., 11; Ohio State Reps., 51-234.)
- 22 (Wash.). There is an established rate of interest in Washington (10 per cent), and the fact that by special contracts different rates may be collected does not affect the question, and therefore a national bank may charge that rate. (*Yakima National Bank v. Knipe*, 33 P., 834; 6 Wash., 348.)
- 23 (Wash.). Revised Statutes of the United States, section 5197, authorizes national banks to take interest at the rate allowed in the State where the bank is located, and, when no rate is fixed by the laws of

## INTEREST AND USURY—Continued.

## WHAT RATE OF INTEREST MAY BE CHARGED—continued.

such State, they are authorized to take interest at a rate not exceeding 7 per cent. *Held*, that since 1 Hill's Code, section 2796, and Session Laws 1893, page 29, allow individuals and State banks to take any rate of interest agreed to in writing by the parties to the contract, national banks have the same privilege. (*Wolverton v. Exchange National Bank of Spokane*, Wash., 39 P., 247; 11 Wash., 94.)

*Rate of interest allowed under Pennsylvania statute.* ●

24 (Pa.). A bank is a private corporation, and its charter a private act, to be pleaded and proved as all other private acts. The court can not take judicial cognizance of the fact that there are State banks whose charters authorize them to take more than 6 per cent interest. (*First National Bank of Clarion v. Gruber*, 87 Pa. St., 468; 30 Am. Rep., 378; 8 Weekly Notes of Cases, 113.)

25 (Pa.). The general rate of interest allowed in Pennsylvania to be taken by State banks is only 6 per cent. The establishment of a few banks authorized by special acts of assembly to take more than this amount is not sufficient to authorize national banks to take usurious interest under that clause of the national-bank act allowing them to charge interest at the same rate as banks of issue organized under the laws of the State wherein the national bank is situate. (Ib.)

26 (Pa., 1878). Neither under the national banking act nor the Pennsylvania usury act of 1858 is the taking of more than 6 per cent interest a fraud upon creditors in itself. (Appeal of Second National Bank of Titusville, 85 Pa. St., 528; 2 N. B. C., 364.)

27 (Pa., 1881). No bank in Pennsylvania can lawfully take more than 6 per cent interest. (*Lebanon National Bank v. Karmany*, 98 Pa. St., 65; 3 N. B. C., 746.)

*Rate of interest chargeable under Dakota statute.*

28 (Sup. Ct. S. Dak., 1894). In an action against the First National Bank of Deadwood to recover illegal interest paid it, the court holds: A Territorial law in force in certain counties of the late Territory of Dakota, which provided that in those counties "it shall be lawful to take, receive, retain, and contract for any rate (of interest) agreed on between the parties," allowed and fixed the rate of interest by law in such counties or district, within the meaning of section 5197, Revised Statutes, which provides that "any association may take, receive, reserve, and charge on any loan \* \* \* interest allowed by the laws of the State, Territory, or district where the bank is located." (*Guild v. First National Bank of Deadwood*, 57 N. W., 499; 4 S. Dak., 566.)

29 (Sup. Ct. S. Dak., 1894). From February, 1881, when said Territorial law was enacted, until July 1, 1887, when the same was repealed, it was lawful for Territorial and private banks and individuals to take, receive, retain, and contract for any rate of interest agreed on between the parties, within the counties named in the act, when there was an express contract in writing fixing the rate. Therefore it was lawful for a national bank in those counties to contract in writing for any rate of interest agreed on between the parties. (Ib.)

30 (Sup. Ct. S. Dak., 1894). Under the general law relating to interest in force in the Territory after July 1, 1887, Territorial and private banks and individuals were allowed to take, receive, retain, and contract for interest at the rate of 12 per cent per annum, and national banks were therefore allowed to take, receive, and retain interest paid at the same rate; and it was not unlawful for such national banks, under the national banking act, to take, receive, and retain interest paid at the rate of 12 per cent per annum, in the absence of an express contract in writing therefor. (Ib.)

31 (Sup. Ct. S. Dak., 1894). Under section 1851, Revised Statutes, one of the sections of the organic act of the Territory of Dakota, which



## INTEREST AND USURY—Continued.

## WHAT RATE OF INTEREST MAY BE CHARGED—continued.

provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," the Territorial legislature was vested with general legislative power, restricted only as prescribed in the act, and subject to the power of Congress to disapprove its acts. (Ib.)

- 32 (Sup. Ct. S. Dak., 1894). The act of Congress, approved July 30, 1886, providing that "the legislatures of the Territories of the United States shall not pass special or local laws \* \* \* regulating the interest on money," was not retroactive, but was applicable only to acts thereafter passed by a Territorial legislature, and did not have the effect to invalidate the then existing interest law in the counties mentioned in the provisions of the act of 1881. (Ib.)
- 33 (Sup. Ct. S. Dak., 1894). The passage of the law of 1881 by the Territorial legislature, which provided for a different rate of interest in certain counties of the Territory from that allowed in other parts of the Territory, was a valid exercise of the legislative power, and was not in conflict with the organic act or the Constitution of the United States. (Ib.)
- 34 (Sup. Ct. S. Dak., 1894). A law changing the rate of interest which can lawfully be taken by reducing such rate does not affect express contracts in writing for interest at the higher rate, made when the law allowing the higher rate was in force, when such contract specifically provides that the interest at the rate specified in the contract shall be payable from the date of the contract until the same is paid. (Ib.)

## RIGHT OF SET-OFF.

*Usury may not be pleaded as payment, set-off, or counterclaim.*

- 1 (U. S. Sup. Ct., 1878). Usurious interest which has been paid to a national banking association can not be applied by way of payment, set-off, or counterclaim in an action by the association to recover the amount of the loan, but a separate action must be brought therefor. (*Barnet v. Muncie National Bank*, 98 U. S., 555.)
- 2 (U. S. Sup. Ct.). Usurious interest paid a national bank on renewing a series of notes can not, in an action by the bank on the last of them, be applied in satisfaction of the debt.  
(U. S. Sup. Ct., 1881) *Driesbach v. National Bank*, 104 U. S.; 52;  
(U. S. Sup. Ct., 1878) *Barnet v. Muncie National Bank*, 98 U. S., 555.
- 3 (U. S. Sup. Ct., 1901). Usurious interest paid in cash upon renewals of a note given to a national bank, and of all other notes of which it was a consolidation, can not be set off in an action upon the note, as the remedy provided by United States Revised Statutes, section 5198, where such usurious interest has been actually paid, viz, a recovery in an action in the nature of an action of debt of twice the amount of the interest thus paid, is exclusive. (*Haseltine et al., Pliffs. in Err., v. Central National Bank*, 4 Banking Cases, 119; 183 U. S., 132.)
- 4 (U. S. C. C., 1881). Interest in excess of the legal rate received by a national bank, although taken in renewal of a series of notes, can not be applied by way of set-off or payment in a suit upon the last of the series. (*Farmers and Mechanics' Bank v. Hoagland*, 7 Fed. Rep., 159.)
- 5 (U. S. C. C., 1881). In such case, however, the bank can not recover the illegal interest, although such interest has been finally incorporated in notes bearing legal rates. (Ib.)
- 6 (U. S. C. C., 1881). Neither can the bank recover any interest upon such renewal notes from the date the interest has been reduced to the legal rate. (Ib.)

## INTEREST AND USURY—Continued.

## RIGHT OF SET-OFF—continued.

- 7 (Colo., 1894). Usurious interest paid a national bank on a note can not be offset against the principal sum due. (*Rockwell v. Farmers' National Bank of Longmont*, 36 P., 905; 4 Col. App., 562.)
- 8 (Ill. App., 1882). Where a national bank has actually taken usurious interest, the party paying it may recover double the amount in an action therefor, but can not set off or counterclaim it in an action to recover the principal; and the action for such penalty must be brought within two years. (*Ellis v. First National Bank of Olney*, 11 Bradw., 275; 3 N. B. C., 378.)
- 9 (Kans. Sup., 1894). Parkhurst having, as maker of the notes to the bank representing the debt secured by the chattel mortgage, paid usurious interest thereon, and having recovered judgment against the bank for twice the interest thus paid under the Federal statute, he can not be allowed to apply the same interest in reduction of the debt secured by the chattel mortgages. (*Parkhurst v. First National Bank of Clyde*, 35 P., 1116; 53 Kans., 136.)
- 10 (Mass. Sup., 1882). In an action by a national bank upon a note the defendant is not entitled to any set-off for legal interest exacted by the bank upon the discount thereof, but the bank can recover only the principal of the note. (*Peterborough National Bank v. Childs*, 133 Mass., 248; 43 Am. Rep., 509; 3 N. B. C., 469.)
- 11 (N. Y. Appls., 1880). In an action by a national bank on a promissory note discounted by it, the defendant may not counterclaim or set off usurious interest taken by the bank on the discount of it and other notes of which it was a renewal. (*National Bank of Auburn v. Lewis*, 81 N. Y., 15; 3 N. B. C., 587.)
- 12 (N. Y. Sup., 1877). In an action by a national bank the defendant can not be allowed a counterclaim for unlawful interest paid by him more than two years prior thereto. (*National State Bank of Newark v. Boylan*, 2 Abbott's N. C., 216; 1 N. B. C., 798.)
- 13 (N. Y. Appls., 1896). Usury can not be pleaded against a national bank. 25 N. Y. S., 447, affirmed. (*Chase National Bank v. Faurot*, 44 N. E., 164; 149 N. Y., 532.)
- 14 (N. C. Sup. Ct., 1881). Usurious interest previously received by a national bank in the course of renewals of a series of notes, terminating in one upon which suit is brought, can not be pleaded by way of set-off or payment, but the only remedy is a separate action for double the interest paid by him. (*Oldham v. Bank*, 85 N. C., 240; 3 N. B. C., 688.)
- 15 (Ohio Sup., 1887). In an action on a note discounted by a national bank, the defendant can not set off the penalty of twice the amount of interest paid on other loans. (*Hade, Receiver, v. McVay*, 31 Ohio St., 231; 2 N. B. C., 353.)
- 16 (Pa. Sup., 1881). Where usurious interest has been paid to a national bank on renewal notes and the bank brings suit on the last note, the defendant may not set off such illegal interest, but his only remedy is by an action against the bank to recover the penalty prescribed by the national bank act. (*National Bank of Fayette County v. Dushane*, 96 Penn. St., 340; 3 N. B. C., 739.)
- 17 (Tex. Civ. App., 1894). The payment of usurious interest to a national bank can not be pleaded as a set-off or counterclaim against the principal of the note so sued on. (*Huggins et al. v. Citizens' National Bank of Kansas City*, 24 S. W., 926; 6 Tex. Civ. App., 33.)
- 18 (W. Va. Sup., 1902). Usurious interest paid a national bank on renewing a series of notes can not, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt. (*Charleston Nat. Bank v. Bradford*, 41 S. E. Rep., 153; 51 W. Va., 255.)

*State laws as to set-off and counterclaim do not apply.*

- 19 (Mo.). Where plaintiff in a suit on a note is a national bank and a counterclaim is set up for alleged usurious interest paid on the note,

## INTEREST AND USURY—Continued.

## RIGHT OF SET-OFF—continued.

the Federal and not the State statutes concerning usury govern the rights of the parties. Judgment, *Bullmaster v. City of St. Joseph* (1897), 70 Mo. App., 60, affirmed. (*Central Nat. Bank v. Haseltine*, 55 S. W., 1015; 155 Mo., 58.)

- 20 (N. Y. App., 1878). The practice and pleadings prescribed by the legislature of the State in regard to a counterclaim or recoupment may not be used to defeat the intention of a Federal enactment. (*National Bank of Auburn v. Lewis*, 81 N. Y., 15; 3 N. B. C., 587.)
- 21 (N. Y. App., 1878). The provision of the United States statutes (section 914) that the practice, pleadings, forms, and modes of proceedings in civil causes in the circuit and district courts shall conform, as near as may be, to those existing at the time in the courts of record of the State has no application in such case. (Ib.)

*Limitation as to offset.*

- 22 (N. Y. Super., 1877). In an action by a national bank the defendant can not be allowed a counterclaim for unlawful interest paid by him more than two years prior thereto. (*Nat. State Bank v. Boylan*, 1 N. B. C., 798; 2 *Abbott's New Cases*, 216.)
- 23 (Ohio Sup., 1875). Where the two years within which an action lies to recover back twice the amount of illegal interest paid to a national bank have elapsed, the right to offset such interest against any claim of the bank is also barred. (*Shinkle v. The First National Bank of Ripley*, 1 N. B. C., 824; 22 Ohio St., 516.)
- 24 (Ohio Sup., 1875). The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying the same to have it applied as a payment of so much of the principal in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the national-bank act, and can not be controlled by State legislation. (*Highley v. The First National Bank of Beverly*, 1 N. B. C., 833; 26 Ohio St., 75.)

*Offsets against claims for penalty.*

- 25 (U. S. C. C., 1880). Section 5073, Revised Statutes, relating to set-offs in bankruptcy proceedings, provides that "in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtors to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition." *Held*, that under this section a judgment obtained by an assignee in bankruptcy, for a penalty incurred by the violation of a State statute against usury, could not be set off against a claim of the judgment debtor against the bankrupt estate. (*Wilson, Assignee, v. National Bank of Rolla*, 3 Fed. Rep., 391.)
- 26 (Pa., 1881). In such suit the defendant can not set off a judgment held by it against the plaintiff. (*Lebanon Nat. Bank v. Karmany*, 98 Penn. St., 65; 3 N. B. C., 746.)

## WHETHER PAYMENTS MADE SHALL BE APPLIED TO PRINCIPAL OR FORFEITED INTEREST.

*Application of payments on usurious note when such payments are not appropriated by the debtor to the payment of interest as such.*

- 1 (Kans. App., 1896). Under Revised Statutes United States, sections 5197, 5198, prohibiting any national bank from charging a greater rate of interest than is allowed by the laws of the State in which it is located, and providing that the taking of such interest shall forfeit the entire interest, a payment to a national bank on a note bearing usurious interest is a payment on the principal debt. (*First National Bank of Hutchinson v. McInturff*, 43 P., 839, 3 Kans. App., 536.)

## INTEREST AND USURY—Continued.

## WHETHER PAYMENTS MADE SHALL BE APPLIED TO PRINCIPAL OR FORFEITED INTEREST—continued.

- 2 (Kans. App.). Under Revised Statutes United States, sections 5197, 5198, providing that the charging of a greater rate of interest by a national bank than that allowed by the laws of the State in which the bank is located, shall forfeit the entire interest, and that, if such interest has been paid, the person who paid the same may recover twice the amount thereof, a payment on a note stipulating for usurious interest is a payment on the principal debt, and not of the interest, which is forfeited. (*First National Bank of Newton v. Turner*, 42 P., 936; 3 Kans. App., 352.)
- 3 (Ky., 1901). The fact that payments made by the debtor have been applied by the bank on its books to interest as such does not authorize the presumption that the debtor so applied them where he had no access to the books and no knowledge of the application made by the bank. (*Second Nat. Bank of Richmond v. Fitzpatrick et al.*, 3 Banking Cases, 461; 63 S. W. Rep., 459.)
- 4 (Ky., 1901). The discounting by a national bank of a note at a usurious rate of interest is merely the "charging" or "reserving" of usury, and not the "taking" or "receiving" of usury; and the debtor's right of action under Revised Statutes United States, section 5198, to recover twice the amount of usurious interest paid, does not accrue when the note is discounted. (*Citizens' Nat. Bank of Danville v. Forman's Assignee*, 63 S. W. Rep., 454; 3 Banking Cases, 451.)
- 5 (Ky., 1901). Where a national bank contracts for interest at a usurious rate it at once forfeits all interest, and unappropriated payments subsequently made by the debtor must be first applied to the principal, so that while any part of the principal remains unpaid there is no payment of usurious interest, and no right to recover the penalty for taking usury accrues unless payments made by the debtor are specifically applied by him to usurious interest, for the law will not presume an application of payments to an illegal and void obligation; nor will it permit the creditor to make such application. (Ib.)
- 6 (Mo. Sup., 1903). Where a general payment is made on a renewal note, which includes usurious interest on an old note, it must be applied on the principal debt, and can not be applied on such usurious interest. (*Citizens' Natl. Bank of Kansas City v. Donnell*, 5 B. C., 504; 72 S. W. Rep., 925.)
- 7 (Nebr. Sup., 1897). In an action against a national bank for the penalty for taking usury, it appeared that the transactions between the plaintiff and the bank consisted of a large number of loans, evidenced by notes, many of which had been from time to time renewed. *Held*, that evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious. (*First National Bank of Tobias v. Barnet* (Nebr.), 70 N. W., 937; 51 Nebr., 397.)
- 8 (Ohio Sup., 1877). Payments made generally on a promissory note to a national bank, which note embraces illegal interest, will be applied in satisfaction of the principal. (*Bank of Cadiz v. Slemmons*, 34 Ohio St., 142; 2 N. B. C., 361.)

## AMOUNT AND EXTENT OF PENALTY.

*Amount recoverable as penalty for usury.*

1. The amount which may be recovered from the association as a penalty is twice the amount of interest paid, and not simply twice the amount in excess of the legal rate.  
 (U. S. Sup. Ct., 1878) *Barnet v. Muncie National Bank*, 98 U. S., 555;  
 (U. S. Cir. Ct., 1876) *Crocker v. First National Bank of Chetopa*, 3 Am. L. T. (N. S.), 350; 1 N. B. C., 317;  
 (Pa.) *Overholt v. National Bank of Mount Pleasant*, 82 Pa. St., 490.

## INTEREST AND USURY—Continued.

## AMOUNT AND EXTENT OF PENALTY—continued.

- 2 (U. S. Sup. Ct., 1902). The provision in Revised Statutes, section 5198, that "in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of debt, twice the amount of the interest thus paid," on the one hand causes a forfeiture of the entire interest to result from the taking, receiving, reserving, or charging a rate greater than is allowed by law, and on the other subjects the creditor to pay twice the amount of the interest illegally exacted if, by persisting in wrongdoing, he subjects the debtor to the necessity of suing to recover. (*First National Bank of Lake Benton v. John W. Watt*, 4 B. C., 319; 184 U. S., 151.)
- 3 (U. S. C. C., 1883). The amount of penalty recoverable in an action against banks under section 5198, Revised Statutes, is twice the whole amount of the interest paid, and not merely twice the amount paid in excess of the legal rate. (*Hill v. National Bank of Barre*, 15 Fed. Rep., 432.)
- 4 (U. S. C. C., 1898). Under Revised Statutes, section 5198, which provides that one paying usurious interest to a national bank may recover back twice the amount of the interest thus paid, it seems that the recovery allowed is twice the amount of the entire interest, and not merely of the excess over the legal rate. (*Louisville Trust Co. v. Kentucky National Bank et al.*, 87 Fed. Rep., 143.)
- 5 (Kans. Appls., 1896). Under United States Revised Statutes, sections 5197, 5198, if usurious interest is paid a national bank the payor may recover back twice the total amount of interest paid. (*First National Bank of Hutchinson v. McInturff*, 43 P., 839; 3 Kans. App., 536.)
- 6 (Ky., 1901). The penalty which may be recovered from a national bank for taking usury is twice the amount of the entire interest paid, and not merely twice the amount of the excess over the legal rate. (*Second Nat. Bank of Richmond v. Fitzpatrick et al.*, 3 Banking Cases, 461; 63 S. W. Rep., 459.)
- 7 (N. Y. Appls., 1876). In an action against a national bank to recover the penalty imposed by the act of Congress for taking a greater rate of interest than is allowed by law, the plaintiff is entitled to recover only twice the amount taken in excess of the legal interest, and not twice the amount of the entire interest paid. (*Hintermister v. First National Bank*, 64 N. Y., 212; 1 N. B. C., 741.)
- 8 (N. Y., 1880). The remedy is an action of debt to recover back twice the amount paid. (*National Bank of Auburn v. Lewis*, 81 N. Y., 15; 3 N. B. C., 587.)
- 9 (Pa. Sup., 1881). In such suit the plaintiff may recover twice the entire amount of interest paid. (*Lebanon National Bank v. Karmany*, 98 Pa. St., 65; 3 N. B. C., 746.)

*Penalty statute not penal, not strictly construed.*

- 10 (Nebr. Sup., 1898). Revised Statutes United States, sections 5197, 5198, prohibiting a national bank from exacting usurious interest and providing for the recovery back of double the amount wrongfully exacted is not a penal statute, and therefore need not be strictly construed. (*Albion Nat. Bank v. Montgomery*, 74 N. W., 1102; 54 Nebr., 681.)

*Penalties of national-bank act for usury exclusive.*

- 11 (U. S. Sup. Ct.). Remedy given by section 5198, Revised Statutes, for recovery of usurious interest paid to a national bank, is exclusive.
  - (U. S. Sup. Ct., 1878) *Barnet v. Muncie National Bank*, 98 U. S., 555.
  - (U. S. Sup. Ct., 1881) *Driesbach v. National Bank*, 104 U. S., 52.
  - (U. S. Sup. Ct., 1884) *Stephens v. Monongahela National Bank of Brownsville*, 111 U. S., 197.

- 12 (Ga.). Revised Statutes United States, section 5198, provides that a national bank which knowingly charges usury shall forfeit the

## INTEREST AND USURY—Continued.

## AMOUNT AND EXTENT OF PENALTY—continued.

entire interest and, in case usury has been paid, shall be liable for twice the amount thereof. The law of Georgia made a waiver of homestead void if part of a usurious contract. A surety signed a usurious note, payable to a national bank, containing a waiver of homestead. He had no knowledge of the usury. *Held*, that the penalty imposed on national banks by the United States statute was exclusive, and hence, a waiver of homestead exemption not being void because of the usury, the surety's risk was not increased, and hence he was not discharged. (*First Nat. Bank of Dalton v. McEntire*, 37 S. E., 381; 112 Ga., 232.)

*Contra.*

- 13 (Ky. Appls., 1898). A debt due a national bank may be purged of usury under the State statute if the debtor so elects, the remedy provided by the national banking act for forfeiture of all interest or recovery of double the usury not being exclusive. (*Farrow v. First Nat. Bank*, 47 S. W., 594.)

*Usury penalties inherited on conversion of bank.*

- 14 (Nebr. Sup., 1894). A national bank succeeding to the business of a private bank inherits the usury penalties incurred by the latter in attempting to enforce a transfer note and mortgage. State usury penalty is applicable to transaction previous to debtor's knowledge that debt was transferred to national bank. (*Exeter National Bank v. Orchard*, 58 N. W., 144; 39 Nebr., 485.)

*No interest allowed on penalty.*

- 15 (Tenn. Sup., 1902). Under Revised Statutes 5198, providing that the person who has paid usurious interest to a national bank may recover back twice the amount paid, he can not recover interest on the amount. (*McCreary v. First Nat. Bank of Morristown*, 5 B. C., 317; 70 S. W. Rep., 821.)

## USURY AS A DEFENSE AGAINST RECOVERY OF INTEREST.

- 1 (U. S. Sup. Ct., 1898). Section 5198 of the Revised Statutes of the United States, prescribing what rate of interest may be taken, received, reserved, or charged by a national banking association, makes a difference between interest which a note, bill, or other evidence of debt "carries with it, or which has been agreed to be paid thereon," and interest which has been "paid." (*Brown v. Marion National Bank*, 169 U. S., 416.)
- 2 (U. S. Sup. Ct., 1898). Interest included in a renewal note or evidenced by a separate note does not thereby cease to be interest within the meaning of section 5198. (*Ib.*)
- 3 (U. S. Sup. Ct., 1838). If a national bank sues upon a note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. (*Ib.*)
- 4 (U. S. Sup. Ct., 1898). The forfeiture declared by the statute is not waived by giving a renewal note in which is included the usurious interest. No matter how many renewals may be made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. (*Ib.*)
- 5 (U. S. Sup. Ct., 1898). If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such rate of interest being illegal, and if renewal notes are executed each year for

## INTEREST AND USURY—Continued.

## USURY AS A DEFENSE AGAINST RECOVERY OF INTEREST—continued.

- five years, without any money being in fact paid by the borrower—each renewal note including past interest, legal and usurious—the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid. (Ib.)
- 6 (U. S. Sup. Ct., 1898). If the note when sued on includes usurious interest, or interest on usurious interest, agreed to be paid, the holder may elect to remit such interest, and it can not then be said that usurious interest was paid to him. (Ib.)
  - 7 (U. S. Sup. Ct., 1898). If the obligee actually pays usurious interest as such, the usurious transaction must be held to have then and not before occurred and he must sue within two years thereafter. (Ib.)
  - 8 (U. S. Sup. Ct., 1904). A national bank met in an action by the plea of usury may not avoid the forfeiture of all interest by then declaring an election to remit the excessive interest. (Citizens' National Bank of Kansas City *v.* Donnell, 195 U. S., 369.)
  - 9 (U. S. C. C., 1877). If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, it can recover only the face of the note less the entire interest received. But if such note be renewed, the borrower paying the usurious interest out of his pocket, in advance, the defendant may recoup, or recover in an independent action, double the amount of the entire interest paid at the renewal. If, instead of paying the usurious interest at each renewal, it be added to the principal and included in the renewal notes, the bank can only recover the amount originally paid to the borrower, i. e., the amount of the last of the renewal notes less all interest included in it. (National Bank of Madison *v.* Davis, 6 Cent. L. J., 106; 1 N. B. C., 350.)
  - 10 (Ark., 1900). In an action for damages against the receiver of a national bank, for deceit and fraud practiced upon plaintiff, by which it was induced to pay out a large sum of money for the worthless note of an insolvent company, defendant's contention that the discount of the note by plaintiff was usurious and illegal, stated no defense, whether it was a New York or Arkansas contract, as a statute of the former does not permit a corporation to interpose the defense of usury, and under the laws of Arkansas the rate charged was legal. (Binghamton Trust Co. *v.* Auten, 2 Banking Cases, 502; 68 Ark., 299.)
  - 11 (Iowa Sup., 1879). Where a national bank lends money upon a usurious contract and attempts to enforce such contract in a State court, the defendant may insist upon such usury as a defense. (National Bank of Winterset *v.* Eyre, 2 N. W. Rep., 995; 2 N. B. C., 234; 52 Iowa, 114.)
  - 12 (Ky. Appls., 1893). Under Revised Statutes United States, section 5198, relating to national banks, providing that the taking a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest, where a national bank loaned money at usurious interest, and added it into a note, which was several times renewed at the usurious rate, the bank is only entitled to recover, in an action on the last note, the principal sum originally loaned, less the partial payments made on the notes. (Snyder *v.* Mount Sterling National Bank, Ky., 21 S. W., 1050; 94 Ky., 231.)
  - 13 (Nebr. Sup., 1894). Where a national bank loans money at a usurious rate, which is included in the note, in an action to enforce the contract the interest is forfeited. (McGhee *v.* First National Bank of Tobias, 58 N. W., 537; 40 Nebr., 92.)
  - 14 (Nebr. Sup., 1897). The defense of usury is available in an action by a national bank for the recovery of unpaid interest, where the rate contracted for by it exceeds that prescribed by the act of Congress. (Tomblin *v.* Higgins, 73 N. W., 461; 53 Nebr., 92.)

## INTEREST AND USURY—Continued.

## USURY AS A DEFENSE AGAINST RECOVERY OF INTEREST—continued.

- 15 (Nebr. Sup., 1888). Where the usurious interest is discounted from the face of the note, the bank can only recover the face of the note, less the interest deducted. If the borrower pays the usurious interest in advance, he may recover double the interest so paid. (*Schuyler National Bank v. Bollong*, 24 Nebr., 825; 3 N. B. C., 561.)
- 16 (N. Y. Appls., 1880). Where a national bank has usuriously reserved a sum greater than the lawful rate of interest on a discount, the amount so reserved is forfeited and may not be recovered in an action upon the note. (*National Bank of Auburn v. Lewis*, 81 N. Y., 15; 3 N. B. C., 587.)
- 17 (Ohio Sup., 1877). In rendering judgment on a promissory note given to a national bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest of both notes will be disallowed. (*Bank of Cadiz v. Slemmons*, 34 Ohio St., 142; 32 Am. Rep., 364; 2 N. B. C., 361.)
- 18 (Pa. Sup., 1879). Where a note is held by a national bank as collateral for overdrafts upon it, and suit is brought upon the note, the action, though nominally upon the note, is actually to recover those overdrafts as against the makers of the note as sureties. Such sureties are entitled, in case usurious interest has been charged, to deduct all the interest charged as against the total amount of overdraft claimed. (*Third Nat. Bank of Philadelphia v. Miller*, 2 N. B. C., 378; 90 Pa. St., 241.)
- 19 (Pa. Sup., 1878). Where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction follows down through the whole, and in action by a national bank on the last of the series, the borrower is entitled to credit for all the interest he has paid from the beginning. (*Cake v. The First National Bank of Lebanon*, 1 N. B. C., 890; 86 Pa. St., 303.)
- 17 (Pa. Sup., 1884). Reid gave Guthrie a judgment note for the latter's accommodation. Guthrie procured it to be discounted by a national bank at a usurious rate of interest. Held, that defendant could avail himself of the usurious discount charged by the bank as a defense to the payment of interest. (*Guthrie v. Reid*, 107 Penn. St., 251; 3 N. B. C., 751.)

*Defense of usury in State court.*

- 20 (Iowa). The defense of usury may be set up in action brought in a State court. (*National Bank of Winterset v. Eyre*, 52 Iowa, 114.)

## ACTIONS.

## ACTION FOR PENALTY THE REMEDY FOR USURY PAID.

- 1 (U. S. Sup. Ct., 1901). In an action upon a note given to a national bank, the maker can not set off or obtain credit for usurious interest paid in cash upon the renewals of such note and others of which it is a consolidation. In cases arising under the second clause of Revised Statutes, section 5198, the person by whom the usurious interest has been paid can only recover the same back in an action in the nature of an action of debt. The remedy given by the statute is exclusive. (*Haseltine v. Central National Bank of Springfield, Mo.*, 183 U. S., 132.)
- 2 (U. S. C. C., 1897). Where more than the legal rate of interest has been paid to a national bank, the remedy is a penal suit to recover twice the amount paid, and such payment is not available as a defense in an equitable proceeding to collect the debt on which it was paid. (*Cox v. Beck et al.*, 83 Fed. Rep., 269.)
- 3 (Pa. Sup., 1879). In no way, either by set-off or original action, can interest over the legal rate paid to a national bank be recovered, except by way of penalty, within two years, as prescribed by the national-bank act. (*First Nat. Bank of Clarion v. Gruber*, 2 N. B. C., 395; 87 Pa. St., 465.)



## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## ACTION FOR PENALTY THE REMEDY FOR USURY PAID—continued.

- 4 (Pa. Sup.). Where usury has been actually paid to and received by a bank, the only remedy is an action for the penalty of "twice the amount of interest thus paid." (*Brown v. The Second National Bank of Erie*, 72 Pa., 209.)
- 5 (Tenn. Sup., 1902). Where usury has been charged and received by a national bank in discounting notes which drew no interest until after maturity, the maker's only remedy to recover such interest was by action under the second subdivision of Revised Statutes United States, section 5198, providing that the person paying usury may recover back twice the amount of interest paid from the bank; and such liability could not be set up by way of crossbill in an action by the bank to recover on the notes. (*First Nat. Bank of Morristown v. Hunter*, 70 S. W. Rep., 371; 5 B. C., 324.)

## WHEN ACTION LIES.

*Action lies for penalty whether debt paid or not.*

- 1 (Ky., 1901). There may be payments of usurious interest as such which will entitle a debtor to recover from a national bank the penalty for taking usury, though the principal sum remains unpaid; and such a case is presented where the interest upon one note is included in the amount of another note and the other note is subsequently paid in full. (*Second Nat. Bank of Richmond v. Fitzpatrick*, 3 Banking Cases, 461; 63 S. W. Rep., 459.)
- 2 (Pa. Sup., 1881). The right of action to recover double the amount of usurious interest paid to a national bank, as provided by section 5197 of the national banking act, accrues upon the actual payment by the borrower of the amount of the illegal interest to the bank, and can be maintained whether the debt has been paid or not. (*Monongahela National Bank v. Overholt*, 96 Penn. St., 327; 3 N. B. C., 735.)
- 3 (Pa. Sup., 1881). The person paying usurious interest may recover twice its amount, although the principal is not paid. (*Lebanon National Bank v. Karmany*, 98 Penn. St., 65; 3 N. B. C., 746.)

*Principal need not be paid before suit for penalty.*

- 4 (Nebr., 1895). The payment of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid on such loan. (*Exeter National Bank v. Orchard*, Nebr., 61 N. W., 833; 39 Nebr., 485.)

*Contra.*

- 5 (Mo.). Under Revised Statutes United States, section 5198, providing that where a national bank knowingly charges a greater rate of interest than is allowed by the laws of the State where it is located, the person paying it may, within two years from the transaction, recover back twice the amount of such interest, in an action in the nature of debt; such an action can not be maintained where plaintiff does not allege or prove that he had paid or tendered the principal sum due. (*Haseltine v. Central Nat. Bank*, 56 S. W., 895; 155 Mo., 66.)

*Action for penalty involves Federal question.*

- 6 (U. S. Sup. Ct., 1902). A decision by the highest court of the State adverse to the right claimed under United States Revised Statutes, sections 5197, 5198, to recover back usurious interest from a national bank, presents a Federal question, which gives to the Supreme Court of the United States the right to review the judgment of such State court. (*Daniel H. Talbot, plff. in err., v. Sioux City First National Bank of Sioux City, Iowa*, 4 Banking Cases, 509; 185 U. S., 172.)

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## WHEN ACTION LIES—continued.

*No interest allowed on penalty prior to judgment.*

- 7 (Kans. App.). Interest is not recoverable on a penalty for receiving usurious interest prior to its merger into judgment. (First National Bank of Newton *v.* Turner, 42 P., 936; 3 Kans. App., 352.)

*Judgment for penalty bears interest from filing of suit.*

- 8 (Ky. Appls., 1901). A judgment against a national bank for twice the amount of interest paid, as a penalty for taking usury, should have been allowed interest from the date of the filing the petition to recover the penalty, that being the date of the first demand therefor. (Second Nat. Bank *v.* Fitzpatrick et al., 3 Banking Cases, 461; 63 S. W. Rep., 459.)

*No action lies to recover usurious interest.*

- 9 (Pa.). Under the thirtieth section of the national banking act the remedy of the "forfeiture of the entire interest" for the exacting of unlawful interest can only be had by way of defense to an action on the note, or to recover the loan, but no action lies for it. (Brown *v.* The Second National Bank of Erie, 72 Pa., 209.)
- 10 (Pa. (C. P.), 1879). A bill in equity will not lie to recover usury from a national bank. (Hambright *v.* National Bank, 3 Lea, 40; 31 Am. Rep., 629; 2 N. B. C., 419.)

*Penalty recoverable though both principal and interest paid.*

- 11 (Nebr. Sup., 1897). Under the national banking act a suit will lie against a national bank to recover payments of usury, though the borrower has paid both principal and interest. (First Nat. Bank of Tobias *v.* Barnett, Nebr., 70 N. W., 937; 51 Nebr., 397.)

## WHO MAY SUE.

*Only he who pays usury may recover penalty.*

- 1 (Md. App., 1879). The party who paid the usurious interest is the only party to the note who is entitled to sue for the penalty. (Lazear *v.* National Union Bank of Maryland, 52 Md., 78; 2 N. B. C., 261.)
- 2 (Md. App., 1879). No one can recover usurious interest paid to a national bank but the party who paid it, and it can not be set off or recouped by another party to the paper. (Ib.)
- 3 (N. Dak.). The right given by Revised Statutes United States, section 5198, to recover double the interest paid to a national bank, when the interest so paid is in excess of that allowed by the laws of the State, is personal to the party paying such usurious interest, and an action to recover the same can be maintained only by such person or his or her legal representatives. (Lealos *v.* Union Nat. Bank, 81 N. W., 56; 9 N. Dak., 77.)

*Partnership may recover penalty.*

- 4 (Nebr. Sup., 1898). Revised Statutes United States, sections 5197, 5198, prohibiting a bank from exacting usurious interest, and providing for the recovery back of double the amount wrongfully exacted, does not restrict the relief thereunder to natural persons, but extends to partnerships. (Albion Nat. Bank *v.* Montgomery, 74 N. W., 1102.)

*When joint makers of note may not join in suit for penalty.*

- 5 (Kans. App., 1897). Under Revised Statutes United States, section 5198, which authorizes the person paying usurious interest to a national bank to recover twice the amount paid, where each of several joint makers of a note has paid his part of the illegal interest out of his individual money they can not join in one action to recover the penalty. (Teague *v.* First Nat. Bank of Salina, 48 P., 603; 5 Kans. App., 300.)

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## WHO MAY SUE—continued.

- 6 (Kans.). Under Revised Statutes, section 5198, which authorizes the person paying usurious interest to a national bank to recover twice the amount paid, one of the joint makers of a note on which illegal interest is charged can not recover the penalty from the bank where the illegal interest was paid by the other maker. (First National Bank of Concordia *v.* Rowley, 34 P., 1049; 52 Kans., 394.)

*After insolvency right to penalty vests in assignee.*

- 7 (U. S. C. C., 1898). An assignee for the benefit of creditors under the Kentucky statutes who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back, under Revised Statutes, section 5198. The assignee is the assignor's "legal representative" in the meaning of that section. (Louisville Trust Co. *v.* Kentucky National Bank et al., 87 Fed. Rep., 143.)

- 8 (Pa. Sup., 1881). The party paying such illegal interest can not recover for it after his discharge from bankruptcy, but the right of action vests in the assignee. (Monongahela National Bank *v.* Overholt, 96 Penn. St., 327; 3 N. B. C., 735.)

*Assignee of bankrupt may recover penalty for usury.*

9. Where a bankrupt has paid usurious interest, his assignee may bring an action against the association to recover the penalty.  
(U. S. C. C.) Wright *v.* First National Bank of Greensburg, 8 Biss., 243;  
(U. S. C. C., 1876) Crocker *v.* First National Bank of Chetopa, 1 N. B. C., 317.

*One suit for all penalties accruing within two years.*

- 10 (N. Y.). The penalty for all illegal interest paid to a national banking association within two years prior to the commencement of proceedings may be recovered in a single action, whether the amount was in one payment or in several. (Hintermister *v.* First National Bank, 64 N. Y., 212.)

*Only he who pays usury may claim forfeiture.*

- 11 (Pa.). Act of Congress, June 3, 1864, section 30, relative to the taking of usury by national banks, does not apply to the discounting by the bank for the payee of a note given in payment of an article, and stipulating for legal interest, and, if it did, would not avail the maker. (Second National Bank of Clarion *v.* Morgan, Pa., 30 A., 957; 165 Pa. St., 199.)

*Creditors are entitled to bankrupt's claim for usury.*

- 12 (U. S. Sup. Ct., 1904). If a claim owned by a bankrupt is of value, his creditors are entitled to it, and he can not, by withholding knowledge of its existence from the trustee, after obtaining a discharge of his debts, immediately assert title to and collect the claim for his own benefit. (First National Bank of Jacksboro *v.* Lasater, 196 U. S., 115.)

## JURISDICTION IN ACTIONS FOR PENALTY.

- 1 (U. S. Sup. Ct., 1902). The defendant in error moved to dismiss the action on the ground that no Federal question was decided by the supreme court of Iowa. *Held*, that the motion should be overruled, as the plaintiff explicitly based his right of action on Revised Statutes 5197, 5198, and as the judgment of the trial court and that of the supreme court of the State denied such right, and this court therefore has jurisdiction. (Talbot *v.* Sioux City First National Bank, 185 U. S., 172.)

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## JURISDICTION IN ACTIONS FOR PENALTY—continued.

- 2 (Ill. Sup., 1874). The courts of one State have no jurisdiction of an action against a national bank located in another State to recover the penalty imposed by the act of Congress for the taking of unlawful interest. (*Missouri River Telegraph Company v. First National Bank of Sioux City*, 74 Ill., 217; 1 N. B. C., 401.)
- 3 (Ky. App., 1876). The State courts will not enforce the penalties imposed by the national banking act for exacting unlawful interest. (*Newell v. National Bank of Somerset*, 12 Bush., 57; 1 N. B. C., 501.)
4. A State court can entertain an action brought to recover of a national banking association the penalty for taking usury.
  - (Md.) *Ordway v. The Central National Bank*, 47 Md., 217;
  - (Ohio) *Hade v. McVay*, 31 Ohio St., 231;
  - (Pa.) *Bletz v. Columbia National Bank*, 87 Pa. St., 87.
- 5 (Nebr. Sup., 1887). Actions and proceedings against any national bank may be brought in any State, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases, to enforce a penalty under section 5198, Revised Statutes. (*First National Bank of Tecumseh v. Overman*, 22 Nebr., 116; 3 N. B. C., 556.)
- 6 (Nebr.). An act of Congress March 3, 1887, section 4, relating to the removal of causes, as corrected by act of Congress August 13, 1888, providing that all national banks shall be deemed citizens of the States in which they are located for the purpose of all actions by or against them, does not subject national banks to the laws of the States in which they are situated as to remedies of the debtor for the requirement by the creditor of usurious interest. (*Norfolk Nat. Bank v. Schwenk*, 64 N. W., 1073; 46 Nebr., 381.)
- 7 (Pa. Sup., 1879). State courts have jurisdiction in an action against a national bank to recover double the amount of usurious interest paid thereto. (*First National Bank of Clarion v. Gruber*, 87 Pa. St., 468; 30 Am. Rep., 378; 8 Weekly Notes of Cases, 113; 2 N. B. C., 382.)
- 8 (Pa. Sup., 1881). State courts have jurisdiction in actions against national banks to recover the penalty imposed upon such banks for taking usurious interest. (*Lebanon National Bank v. Karmany*, 98 Pa. St., 65; 3 N. B. C., 746.)
- 9 (Pa. Sup., 1879). State courts have jurisdiction of suits to recover penalty for usurious interest. (*First Nat. Bank of Clarion v. Gruber*, 2 N. B. C., 395; 87 Pa. St., 465.)
- 10 (Tenn. Sup., 1902). A State court has jurisdiction of an action against a national bank to recover a penalty for charging usurious interest under Revised Statutes 5197, 5198, imposing such penalty, and providing that the suit, action, and proceeding against any association under this title may be had in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. (*McCreary v. First Nat. Bank of Morristown*, 5 B. C., 317; 70 S. W. Rep., 821.)
- 11 (Vt. Sup., 1877). State courts have jurisdiction of suits against national banks to recover money paid as usury. (*Dow v. Irasburg Nat. Bank of Orleans*, 50 Vt., 112; 2 N. B. C., 421.)

## COMPLAINT, SUFFICIENCY OF, IN SUIT FOR PENALTY, PROOF.

- 1 (U. S. Sup. Ct., 1889). When the complaint alleges that the usurious transactions took place at a given date more than two years before the commencement of the action, and at other times and dates subsequent thereto. *Held*, that though it might have been made more specific, the complaint was sufficient to sustain a judgment in an action against a national bank for exacting usurious interest, the

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## COMPLAINT, SUFFICIENCY OF, IN SUIT FOR PENALTY, PROOF—continued.

- jury having found that the usurious interest had been taken during the two years next before the commencement of the action. (*First National Bank of Charlotte v. Morgan*, 132 U. S., 141.)
- 2 (U. S. Sup. Ct., 1877). The national currency act should be liberally construed to effect the ends for which it was passed, but a forfeiture under its provisions should not be declared unless the facts upon which it rests are clearly established. In case of a claim of forfeiture against a bank for taking unlawful interest upon the discount of bills of exchange payable at another place, it should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest and the current exchange for sight drafts. Accordingly, where it was not shown what the rate of exchange was, a charge of one-quarter of 1 per cent in addition to the statutory rate of interest would not be sufficient to authorize a forfeiture. (*Wheeler v. Union National Bank of Pittsburg*, 96 U. S., 785; 2 N. B. C., 9.)
- 3 (Nebr. Sup., 1888). When an action is brought to recover a penalty under sections 5197 and 5198, Revised Statutes, for taking, receiving, reserving, or charging a rate of interest greater than is allowed by law, it is necessary to allege in the petition that the act was "knowingly done." (*Schuyler National Bank v. Bollong*, 24 Nebr., 821; 3 N. B. C., 558.)
- 4 (N. Dak.). A complaint, by an executrix of the will of her deceased husband, to recover double the amount of usurious interest paid for money borrowed from a national bank by such husband during his lifetime, which shows that no payments were made on such debt by such husband, and that the total payments made to the bank by her as executrix did not equal in amount the sum alleged to have been borrowed, with lawful interest, and that the additional payments which constituted the usury were made by her in an individual capacity, prior to qualifying as executrix, does not state a cause of action in her representative capacity, under Revised Statutes United States, section 5198, giving a party the right to recover double the interest paid to a national bank, when the interest so paid is greater than allowed by the laws of the State. (*Lealos v. Union Nat. Bank*, 81 N. W., 56; 9 N. Dak., 77.)
- 5 (S. Dak., 1894). A complaint that alleges that the defendant "knowingly and usuriously charged, took, received, and reserved from plaintiff, and that plaintiff paid to defendant for interest, \* \* \* being at the rate of 24 per cent per annum," giving time, amount, etc., states facts sufficient to constitute a good cause of action for the recovery of such alleged illegal interest under the national banking act. (*Guild v. First National Bank of Deadwood*, 57 N. W., 499; 4 S. Dak., 566.)

*Action for penalty, demand not prerequisite.*

- 6 (Kans. Appls., 1895). In an action for the penalty for charging usurious interest a demand need not be shown. (*First National Bank of Newton v. Turner*, 42 P., 936; 3 Kans. App., 352.)

## LIMITATIONS IN ACTIONS FOR PENALTY FOR USURY.

- 1 (U. S. Sup. Ct., 1898). If the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter. (*Brown v. Marion Nat. Bank*, 169 U. S., 416.)
- 2 (U. S. Sup. Ct., 1901). The inclusion of usurious interest as principal in notes given to a national banking association does not constitute a

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## LIMITATIONS IN ACTIONS FOR PENALTY FOR USURY—continued.

payment of the interest within the meaning of United States Revised Statutes, sections 5197, 5198, so as to start the running of the statute against a right of action to recover twice the amount of interest paid; but "the usurious transaction" from the date of which the statute begins to run is the time when the usurious interest is actually paid. (*Nat. Bank of Daingerfield v. Ragland*, 3 Banking Cases, 466; 181 U. S., 45.)

- 3 (U. S. Sup. Ct., 1902). A petition to recover back usurious interest from a national bank, under United States Revised Statutes, sections 5197, 5198, which shows on its face that the action was not "commenced within two years from the time the usurious transactions occurred," as required by the latter section, can not withstand a demurrer because of an allegation that the charge and reservation of the usurious interest were without plaintiff's knowledge or consent, since, even if the period of limitation of the statute does not begin until discovery of the wrong, the court will not indulge the presumption that plaintiff's consciousness of the wrong was not aroused until some time within two years before the commencement of the action. (*Talbot v. First National Bank of Sioux City*, 4 Banking Cases, 509; 185 U. S., 172.)
- 4 (U. S. C. C., 1900). On a settlement between a national bank and a debtor who owed the bank some \$69,000 on a number of notes, a payment was made which reduced such indebtedness to \$30,000, for which a new note was given. *Held*, that, both on general principles, in accordance with the presumed intention of the parties, and under Kentucky Statutes; section 2219, clause 3, which provides that "partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due," all past interest, whether usurious or otherwise, must be regarded as having been paid in the settlement, and that limitation commenced to run on that date against an action under Revised Statutes, section 5198, to recover the penalty for usury previously contracted for. (*Louisville Trust Company v. Kentucky Nat. Bank*, 102 Fed. Rep., 442.)
- 5 (U. S. C. C., 1900). Where a national bank discounts a note at a usurious rate, the maker or his legal representative, on payment of the note, is entitled to recover as a penalty, under Revised Statutes, section 5198, double the amount of the discount so taken, and of all interest subsequently paid on the note or its renewals, although separate payments of interest were made from time to time after its maturity, and all at legal rates; and limitation does not begin to run against an action to recover such penalty until full payment of the note or its renewals. (*Ib.*)
- 6 (U. S. Dist. Ct., 1878). Where a national bank has taken usurious interest on a loan or discount, it may elect to apply the excess of interest on the principal at any time before the loan is paid in full, or before judgment is entered for the full amount. Therefore, the two years within which an action may be brought to recover twice the amount of interest paid do not begin to run until the principal has been paid or a judgment entered for the full amount thereof. (*Duncan v. First Nat. Bank of Mt. Pleasant*, 1 N. B. C., 360.)
- 7 (U. S. C. C., 1898). Usurious interest on a note is not paid, so as to set running the statute of limitations against an action to recover it back, by giving a renewal note which includes the interest. The statute only begins to run from the time the renewal note is paid. (*Louisville Trust Co. v. Kentucky Nat. Bank et al.*, 87 Fed. Rep., 143.)
- 8 (Iowa Sup., 1902). Where an action to recover illegal interest charged by a national bank was barred by limitations, and defendant collected a judgment against plaintiff for costs, such a collection was

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## LIMITATIONS IN ACTIONS FOR PENALTY FOR USURY—continued.

not a further usurious transaction, extending the period of limitations. (*Talbot v. First Nat. Bank of Sioux City*, 4 Banking Cases, 387.)

- 9 (Nebr. Sup., 1894). The limitation of two years within which suit may be brought against a national bank under section 5198, Revised Statutes, for taking usurious interest begins to run from the time when the usurious interest is paid. (*First National Bank of Dorchester v. Smith*, 57 N. W., 996; 39 Nebr., 90.)
- 10 (Nebr. Sup.). The limitation under Revised Statutes United States, section 5198, of actions for the recovery from a national bank of a penalty for usury dates from the payment of such interest, and not from the reservation of it from the original loan by way of discount. (*Smith v. First National Bank of Crete*, Nebr., 60 N. W., 866; 42 Nebr., 687; *Lanham v. First National Bank of Crete*, 60 N. W., 1041; 42 Nebr., 757.)
11. Under Revised Statutes, section 5198, providing that a suit against a national bank for taking usurious interest must be commenced within two years from "the time the usurious transaction occurred," the limitation begins to run from the time when such interest is paid. (N. J. Ct. of Errors and Appeals, 1890) *National Bank of Rahway v. Carpenter*, 19 At., 181; 52 N. J. L., 165; (Tenn. Sup., 1893) *Bobo v. People's National Bank of Shelbyville*, 21 S. W., 888; 92 Tenn., 444.
- 12 (Pa. Sup., 1871). The limitation of two years within which an action for the penalty must be brought commences to run from the actual payment of the usury. (*Brown v. Second Nat. Bank of Erie*, 72 Pa., 209; 1 N. B. C., 849.)
- 13 (U. S. Sup. Ct., 1904). The payment contemplated by the statute is an actual payment and not a further promise to pay, is not made until the bank receives its money, and an action must be brought within two years from that date. (*First National Bank of Jacksboro v. Lasater*, 196 U. S., 115.)

*When State statute does not govern.*

- 14 (Pa. Sup., 1875). In actions for the recovery of usurious interest, a State statute limiting the time within which an action to recover excessive interest may be brought does not apply. (*Lucas v. Government Nat. Bank of Pottsville*, 1 N. B. C., 872; 78 Pa. State, 228.)

## RELEASE AND DISCHARGE OF CLAIMS FOR PENALTY.

- 1 (N. Y. App., 1882). Plaintiff, as assignee in bankruptcy of A, sued to recover the penalties imposed by the national banking act for charging and receiving usurious rates of interest. Defendant proved a release and discharge executed by A before the commencement of the bankruptcy proceedings. Plaintiff gave in evidence the record of a judgment in his favor in an action in which he, as assignee, sued defendant to recover a payment of a debt made to it by A about a month prior to the execution of the release, as having been made when A was insolvent, and when defendant had reasonable cause to believe that fact and knew the payment was made in fraud of the bankrupt act. *Held*, that defendant was not concluded or affected by the judgment. (*Getman v. Second National Bank of Oswego*, 89 N. Y., 136; 3 N. B. C., 599.)
- 2 (N. Y. App., 1885). In an action under United States Revised Statutes, section 5198, against a national bank to recover twice the amount of usurious interest taken on loans made by it to McRae, the defendant proved an oral agreement between it and McRae, whereby the

## INTEREST AND USURY—Continued.

## ACTIONS—Continued.

## RELEASE AND DISCHARGE OF CLAIMS FOR PENALTY—continued.

latter agreed to settle and discharge all such claims against defendant; that the same be applied in payment of that part of his indebtedness to the bank not collected by it from any other source, and that he would not sue or allow suit to be brought against the bank on account of such illegal interest. In consideration thereof the bank agreed that it would satisfy so much of the indebtedness of McRae as remained after applying all other available collections, or would consent as a creditor to his discharge in bankruptcy, as he might request. At the time of the agreement McRae was indebted to defendant in a large amount, and after applying all the collections there remained due a sum much larger than the excessive interest, none of which indebtedness has been paid. *Held*, that the agreement operated as an immediate discharge and satisfaction of the claim of McRae against defendant. (*Morehouse v. Second National Bank of Oswego*, 98 N. Y., 503; 3 N. B. C., 631.)

- 3 (N. Y. App., 1885). Inconsistent action by the defendant subsequent to the agreement did not affect its legal operation. (Ib.)

*Holder of usurious note may elect to remit.*

- 4 (U. S. Sup. Ct., 1898). If the note when sued on includes usurious interest or interest upon usurious interest agreed to be paid, the holder may elect to remit such interest, and it can not then be said that usurious interest was paid to him. (*Brown v. Marion National Bank*, 169 U. S., 416.)

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## JURISDICTION—Continued.

## GENERALLY.

*National bank a citizen, where.*

1. By the acts of July 12, 1882, March 3, 1887, and August 13, 1888, national banks are, for the purposes of the jurisdiction of the United States courts in actions by or against them, to be deemed citizens of the States in which they are located.  
(U. S. Sup. Ct., 1903) *Continental National Bank v. Buford*, 191 U. S., 119;  
(U. S. C. C. A., 1892) *Burnham et al. v. First National Bank of Leoti*, 53 Fed. Rep., 163.
- 2 (Nev.). A national banking association is, for jurisdictional purposes, a citizen of the State in which it is located. (*Davis v. Cook*, 9 Nev., 134.)

*Who may not enter appearance for United States.*

- 3 (U. S. Sup. Ct., 1870). Neither the Comptroller nor the receiver, by putting in an appearance to a suit, can subject the United States to the jurisdiction of a court. (*Case v. Terrell*, 78 U. S. (11 Wall.), 199.)

*Actions against national banks, where brought.*

- 4 (U. S. Sup. Ct., 1880). The provisions of the banking law, section 5198, Revised Statutes, which requires that actions brought against national banking associations in State courts shall be brought in the county or city in which the association is located, applies only to transitory actions. It was not intended to apply to actions local in their character. (*Casey v. Adams*, 102 U. S., 66.)
- 5 (U. S. Sup. Ct., 1880). Actions local in their nature may be maintained in the proper State court in a county or city other than that where it is established. (*Ib.*)
- 6 (U. S. Sup. Ct., 1871). A national bank may be sued in any State, county, or municipal court in county or city where located. (*First National Bank of Bethel v. Pahquioque National Bank*, 14 Wall., 383.)
- 7 (U. S. Sup. Ct., 1869). Under section 57 of act of 1864, suits may be brought by, as well as against, any association. (*Kennedy v. Gibson*, 8 Wall., 498.)
- 8 (Nebr. Sup., 1899). Where a cause has been removed from a State court to the Federal court, and has been by that court remanded to the State court for want of jurisdiction, it is the duty of the State court, in subsequent proceedings, to treat as conclusive upon it the decision of the Federal court on the question of jurisdiction. (*Gerner v. Mosher et al.*, 1 Banking Cases, 457; 58 Nebr., 135.)

*Section 5198, national banking act, construed.*

- 9 (U. S. C. C., 1876). A proceeding against a national bank for the cancellation of a mortgage may be brought in a parish of Louisiana where the bank is not situated. Section 5198 of the national-bank act does not exclude other forums than those specified, and relates only to actions to recover usurious interest. (*New Orleans Banking Association v. Adams*, 2 N. B. C., 207; 2 Woods, 21.)

*Parties—When foreign corporation can not be made a party defendant.*

- 10 (U. S. C. C. A., 1898). Unless it voluntarily appears, a foreign corporation can not be made a party defendant to a suit in a Federal court by one of its creditors, who seeks the appointment of a receiver, an accounting, and to enforce the individual liability of stockholders who are within the jurisdiction of the court. (*Elkhart National Bank v. Northwestern Guaranty Loan Company et al.*, 87 Fed. Rep., 252.)
- 11 (U. S. C. C. A., 1898). The corporation and all its stockholders are necessary parties defendant to a creditor's suit for the appointment of a receiver, an accounting, and to enforce the personal liability of stockholders, and if the corporation can not be brought in the suit must be dismissed. (*Ib.*)

## JURISDICTION—Continued.

## GENERALLY—continued.

*What amounts to general appearance, effect of.*

- 12 (Okla. Sup., 1900). Where a defendant files a plea in the nature of a plea in abatement, which questions the jurisdiction of the court over the person of the defendant, and such defendant, without requesting or obtaining a ruling upon such plea, voluntarily obtains leave of court, and files his answer to the merits of the case, the filing of such answer waives the special plea to jurisdiction and amounts to a general appearance in the case for all purposes. (Winfield Nat. Bank v. McWilliams, 2 Banking Cases, 277; 9 Okla., 493.)

*Effect of filing plea in abatement.*

- 13 (Tenn. Chancery Appeals, 1897). The appearance by attorney of a non-resident national bank, the filing of a plea in abatement, and granting the bank an appeal will not give the court jurisdiction in a suit in which it was attempted to bring the bank before the court by attachment of debts due it by such defendants as were served with process. (Rosenheim Real Estate Co. v. Southern Nat. Bank, 46 S. W., 1026.)

*Statutes United States, 1888, chapter 866, section 4, construed.*

- 14 (N. Y. Sup.). Under Statutes United States, 1888, chapter 866, section 4, providing that in actions against national banks the Federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State," an action to compel the directors of a national bank to declare a dividend may be maintained in a State court. (Hiscock v. Lacy, Sup., 30 N. Y. S., 860; 9 Misc. Rep., 578.)
- 15 (N. Y. Sup.). The object of this proviso was to deprive the United States courts of jurisdiction of suits by or against national banking associations in all cases where banks organized under State laws could not likewise sue or be sued in such courts. (Ib.)
- 16 (U. S. C. C., 1886). But the proviso does not affect the right of the receiver of an insolvent association to sue in a Federal court. (Hendee v. Connecticut and P. R. R. Co., 26 Fed. Rep., 677.)
- 17 (U. S. C. C., 1886). Nor would the act of July 12, 1882, take from the circuit court jurisdiction of a suit brought against a director for negligent performance of his duties; for as such suits rest upon the requirements of the United States laws and by-laws made pursuant thereto, it is a case arising under the laws of the United States. (Witters, Receiver, v. Foster, Admr., 26 Fed. Rep., 737.)

## WHEN FEDERAL COURTS HAVE JURISDICTION,

## GENERALLY.

*In action between residents of different States.*

- 1 (U. S. Sup. Ct., 1892). A national bank located in one State may bring suit against a citizen of another State in the circuit court of the United States for the district wherein the defendant resides by reason alone of diverse citizenship. (Petri v. Commercial National Bank of Chicago, 142 U. S., 644.)
- 2 (U. S. C. C., 1889). The Federal courts have jurisdiction of an action between a national bank located in one State and a citizen of another State. (First National Bank v. Forest, 40 Fed. Rep., 705.)
- 3 (U. S. C. C. A., 1896). A suit brought in a State court can be removed to a Federal court on the ground of diverse citizenship only when the defendant is a nonresident of the State in which it is brought. (Thurber v. Miller, 14 C. C. A., 432; 67 Fed. Rep., 371, followed. Wichita National Bank et al. v. Smith, 72 Fed. Rep., 568.)
- 4 (U. S. C. C. A., 1896). A national bank can not remove a suit upon the ground that it is a Federal corporation. (Ib.)

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## GENERALLY—continued.

- 5 (U. S. C. C., 1896). Where a judgment recovered in a State court against a county is assigned to a citizen of another State, the assignee may sue thereon in the proper Federal court, although the original judgment is still in force. The assignee has a right to have judicially determined its right to enforce payment of the indebtedness, and the action is not to be considered as brought merely to vex defendant. (*First National Bank of Buchanan County v. Duel County*, 74 Fed. Rep., 373.)
- 6 (U. S. C. C., 1896). A Federal court has jurisdiction of a creditor's bill between citizens of different States, though based upon the judgment of a State court, and notwithstanding the existence of statutory legal remedies in the State courts. (*First National Bank of Chicago v. Steinway et al.*, 77 Fed. Rep., 661.)

*When district and not circuit court has jurisdiction.*

- 7 (U. S. Sup. Ct., 1890). In an action against a national bank in a circuit court of the United States, if all the parties are citizens of the district in which the bank is situated, and the action does not come under section 5209 or section 5239, Revised Statutes, the circuit court has no jurisdiction. (*Whittemore v. Amoskeag National Bank*, 134 U. S., 527.)

*National bank must be sued in district where located.*

- 8 (U. S. C. C.). A national bank can not be sued in the Federal court outside of the district where it is located. Service on the cashier when found within another district does not give jurisdiction. (*Main, Assignee, v. Second National Bank of Chicago*, 6 Bissell, 26.)
- 9 (U. S. C. C., 1881). A national bank is not authorized to sue in any circuit court of the United States without regard to citizenship. It is to be regarded, for the purpose of jurisdiction, as a citizen of the State in which it is established or located. (*St. Louis National Bank v. Allen et al.*, 5 Fed. Rep., 551.)

*Act July 12, 1882, applies only to suits subsequently brought.*

- 10 (U. S. Sup. Ct., 1889). The provision of section 4 of act of July 12, 1882, respecting suits by or against national banks, refers only to suits brought after the passage of that act. (*First Nat. Bank of Charlotte v. Morgan*, 132 U. S., 141.)

*When limitations a Federal question.*

- 11 (U. S. Sup. Ct., 1891). When a State bank, acting under a statute of the State, calls in its circulation issued under State laws and becomes a national bank under the laws of the United States, and a judgment is recovered in a court of a State against the national bank upon such outstanding circulation, the defense of the State statute of limitations having been set up, a Federal question arises which may give this court jurisdiction in error. (*Metropolitan National Bank v. Claggett*, 141 U. S., 520.)
- 12 (U. S. C. C., 1879). Where the State and Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court, and in such cases the Federal courts will follow the decisions of the local State tribunals and will administer the same justice that the State courts would administer between the same parties. (*Price, Receiver, v. Yates*, 2 N. B. C., 204; 19 Alb. Law Journal, 295.)

*Voluntary appearance gives jurisdiction of person.*

- 13 (U. S. Sup. Ct., 1889). The exemption of national banks from suits in State courts in other than their own county or city, by act of February 18, 1875 (18 St., 316, chap. 80), was a personal privilege which

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## GENERALLY—continued.

could be waived by appearing to such suit and not claiming the immunity. (*First National Bank of Charlotte v. Morgan*, 132 U. S., 141.)

- 14 (U. S. C. C. A., 1893). In a suit which is properly brought in a Federal court, because it involves a Federal question, the court has full jurisdiction of the defendant, who, though a resident of another district, waives his personal privilege of being sued in his district by voluntarily appearing. (*Walker et al. v. Windsor Nat. Bank*, 56 Fed. Rep., 76.)

*Actions concerning taxation of shares of national bank.*

- 15 (U. S. Sup. Ct., 1882). A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on their shares by the State authorities. (*Hills v. National Albany Exchange Bank*, 3 N. B. C., 45; 105 U. S., 319.)
- 16 (U. S. C. C., 1881). An action to enforce a right conferred by section 5219 of the Revised Statutes, regarding the taxation of property in the shares of national banking associations, is a suit arising "under the laws of the United States" within the meaning of the act of March 3, 1875. (*Stanley v. Board of Supervisors of Albany Co.*, 6 Fed. Rep., 561.)
- 17 (U. S. C. C., 1896). A Federal court has jurisdiction of a suit to enjoin State taxing officers from enforcing collection of a tax upon shares of stock in a national bank where the protection sought is based upon the ground that the State statute under which such officers are proceeding in making their assessment is in violation of the fourteenth amendment to the Constitution and of Revised Statutes, section 5219. (*Third National Bank of Pittsburg v. Mylin, Auditor-General, et al.*, 76 Fed. Rep., 385.)

*When provision against Federal jurisdiction does not apply.*

- 18 (U. S. C. C., 1893). The provision that the Federal courts shall not have jurisdiction of an action on a promissory note or other chose in action by an assignee thereof, unless the action might have been maintained in such courts if no assignment or transfer had been made (act August 13, 1888), does not apply to the indorsement and transfer by the payee of notes which were made to him merely that he might, as agent of the maker, raise money for it by negotiating them with third persons. (*Holmes v. Goldsmith*, 147 U. S., 150, followed. *Wachusett National Bank v. Sioux City Stove Works*, 56 Fed. Rep., 321.)

*In suits on bonds of bank officers.*

- 19 (U. S. C. C. A., 1893). A suit on the official bond of the cashier of a national bank, conditioned for a faithful performance of the duties thereof "according to law and the by-laws" of the bank, involves a Federal question and is maintainable in a Federal court irrespective of the citizenship of the parties. (*Walker et al. v. Windsor National Bank*, 56 Fed. Rep., 76.)

*In actions against executors.*

- 20 (U. S. C. C., 1894). A Federal court is not deprived of jurisdiction otherwise vested in it of a suit (by the receiver of a national bank) against the executors of an estate by the fact that the estate is in the possession of a State probate court for purposes of administration, and the Federal court has jurisdiction to adjudge whether a liability exists, but can not issue execution to enforce the same. (*Wickham v. Hull et al.*, 60 Fed. Rep., 326.)

*When Federal courts adopt remedy provided by State law.*

- 21 (U. S. C. C., 1895). It seems that where a State statute creates a right in favor of creditors, and provides a remedy for the enforcement

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## GENERALLY—continued.

thereof, this remedy, whether at law or in equity, must be adopted by the Federal courts. If the State statute does not create the right, but only redeclares a right existing in the absence of statute, then the form of remedy in the Federal courts is determined by principles which differentiate legal and equitable jurisdiction. (*First National Bank of Sioux City v. Peavy*, 69 Fed. Rep., 455.)

*National bank's right to sue is derived from national banking act.*

22 (U. S. C. C., 1883). The act of July 12, 1882; to enable national banks to extend their corporate existence, placed national and other banks, as to their right to sue in the Federal courts, on the same footing, and consequently a national bank can not, in virtue of a mere corporate right, sue in such court. (*Union National Bank of Cincinnati v. Miller*, Treasurer of Hamilton County, Ohio, 15 Fed. Rep., 703.)

23 (U. S. C. C., 1883). But national banks may, like other banks and citizens, sue in such courts whenever the subject-matter of litigation involves some element of Federal jurisdiction. Thus a suit by a national bank against a county treasurer to enjoin the collection of an excessive tax upon its personal property, alleged to be made in violation of the act of Congress permitting the State to tax national banks, presents a case arising under a law of Congress, and is therefore maintainable in a Federal court. (*Ib.*)

*Federal courts may order inspection of books.*

24 (U. S. C. C., 1894). The power given the Federal courts to order the production of books and papers (Rev. Stat., sec. 724) includes power to grant an inspection before trial, with permission to make copies. (*Exchange National Bank of Atchison v. Wichita Cattle Co.*, 61 Fed. Rep., 190.)

*Suit of assignee in bankruptcy.*

25 (U. S. Dist. Ct., 1878). An assignee in bankruptcy should be permitted to litigate in the Federal court a question involving the powers of a national bank to make loans of a particular character on real mortgage, and not remitted to the State court. (*In re Duryea*, 2 N. B. C., 170.)

*Jurisdiction of Federal courts—Diversity of citizenship—Realignment of parties in equity.*

26 (U. S. C. C., 1903). Where a bill filed in a Federal court by stockholders against the corporation and others does not conform to the requirement of equity rule 94 by showing the efforts made to secure action by the stockholders, or excuse the failure to make such efforts, the usual rule applies that the parties must be aligned according to their interest for the purpose of determining the jurisdiction of the court, and the corporation must be aligned with the complainants. (*Waller et al. v. Coler et al.*, 125 Fed. Rep., 821.)

*Jurisdiction of Federal courts—Federal question—Action against agent of insolvent national bank.*

27 (U. S. C. C. A., 1903). An action against a stockholder's agent for winding up the affairs of a national bank is one of which a Federal court has jurisdiction, irrespective of citizenship, under section 4, Judiciary Act Aug. 13, 1888, c. 866, 25 Stat., 436 [U. S. Comp. St., 1901, p. 514]. (*Weeks v. International Trust Co.*, 125 Fed. Rep., 370.)

*Recovery of penalty under national banking act.*

28 (Ill. Sup., 1874). State courts have no jurisdiction of actions to recover penalties imposed by the national banking act. (*Missouri River Telegraph Company v. First National Bank of Sioux City*, 74 Ill., 217; 1 N. B. C., 401.)

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## WHEN FEDERAL SUPREME COURT HAS JURISDICTION.

- 1 (U. S. Sup. Ct., 1891). This court has jurisdiction to review a judgment in State courts involving the question whether a national bank is exempt by an act of Congress or its charter from liability to account for bonds purchased by it on condition of selling back on demand. (*Logan County National Bank v. Townsend*, 139 U. S., 67.)
- 2 (U. S. Sup. Ct., 1896). The fact that the State supreme court, in affirming a judgment, decided against an immunity from liability expressly claimed under the laws of the United States, does not give jurisdiction to the Federal Supreme Court, if such immunity was not claimed in the trial court. (*Chemical National Bank of Chicago v. City Bank of Portage*, 16 S. Ct., 417; 160 U. S., 646.)
- 3 (U. S. Sup. Ct., 1882). Where a party sues out a writ of error to a State court, this court has no jurisdiction to reexamine the judgment or the decree, although it be adverse to the Federal right, if he set up and claimed the right, not for himself, but for a party in whose title he had no interest. (*Miller v. National Bank of Lancaster*, 106 U. S., 542; 3 N. B. C., 52.)
- 4 (U. S. Sup. Ct., 1877). This court has jurisdiction of an appeal from a decree of a circuit court requiring stockholders in an insolvent national bank to pay a given percentage on their stock, which the Comptroller of the Currency had ordered collected and such further sums as may be necessary to pay the debts of the bank. (*Germania National Bank of New Orleans v. Case*, 131 U. S., CXLIV App.)
- 5 (U. S. Sup. Ct., 1897). This court has jurisdiction to review a judgment of the highest court of a State holding a national bank liable, under a statute of the State, as a shareholder in a State savings bank, when the answer sets up that the stock of the savings bank was issued to it without authority of law, and the motion for a new trial and the specifications of error, which were the basis of appeal from the trial court to the supreme court of the State, assert such want of power under the laws of the United States. (*California Bank v. Kennedy*, 167 U. S., 362.)
- 6 (U. S. Sup. Ct., 1899). As the controversy in this case involved the question on what basis dividends in insolvency should have been declared, and therein the enforcement of the trust in accordance with law, this court has jurisdiction of it in equity. (*Merrill v. National Bank of Florida* (Jacksonville), 173 U. S., 131; 1 Banking Cases, 210.)
- 7 (U. S. Sup. Ct., 1899). In a suit by a creditor of an insolvent national bank against its receiver, where the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, the contention that the bill should be dismissed because of adequate remedy at law was without merit. (*Ib.*)
- 8 (U. S. Sup. Ct., 1902). A decision by the highest court of a State adverse to the rights claimed under United States Revised Statutes, sections 5197, 5198, to recover back usurious interest from a national bank, presents a Federal question which gives to the Supreme Court of the United States the right to review the judgment of such State court. (*Daniel H. Talbot, plff. in error, v. Sioux City First National Bank, of Sioux City, Iowa*, 4 Banking Cases, 509; 185 U. S., 172.)
- 9 (U. S. Sup. Ct., 1899). Notes secured by mortgage had been indorsed, and the mortgage assigned to the defendant national bank as collateral security for a loan, and plaintiff had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance; but, instead of doing this, the bank had undertaken to purchase the notes itself, and had not accounted for their value. In an action against the bank to recover the value of the notes, it was held by a State court that it was not an ultra vires act on the part

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## WHEN FEDERAL SUPREME COURT HAS JURISDICTION—continued.

of the bank to undertake to sell the notes as defendant's agent, and that if it was guilty of conversion plaintiff could recover. *Held*, on motion to dismiss a writ of error to revise a judgment of the State court, that the contention that no Federal question was involved, because such judgment rested on two grounds, one of which was broad enough in itself to sustain the judgment, and involved no Federal question, was without merit. (First Nat. Bank of Grand Forks, N. Dak., *v.* Anderson, 1 Banking Cases, 89; 172 U. S., 573.)

*Amount necessary to give jurisdiction.*

- 10 (U. S. Sup. Ct., 1886). In an action of debt on section 5198, United States Revised Statutes, to recover twice the amount of interest, at the rate of 9 per cent, received by a national bank in Pennsylvania, upon the discount of notes, where plaintiffs had judgment for \$2,150.38, *held*, that this amount was insufficient to give jurisdiction to the Supreme Court of the United States. (Williamsport National Bank *v.* Knapp, 119 U. S., 357; 3 N. B. C., 184.)

*When judgment of circuit court of appeals is final.*

- 11 (U. S. Sup. Ct., 1903). An action brought by a national banking association in a circuit court of the United States, against citizens of another State, where no ground of jurisdiction appears in the record except diversity of citizenship, is not, owing to the mere fact that the plaintiff is organized under the national banking law, one arising under the laws of the United States, and under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals is final and therefore not subject to review by this court. (Continental National Bank of Memphis *v.* Buford, 191 U. S., 119.)

## WHEN CIRCUIT COURT OF APPEALS OR CIRCUIT COURT HAS JURISDICTION.

*When circuit court of appeals has no jurisdiction.*

- 1 (U. S. C. C. A., 1892). The circuit court of appeals has no jurisdiction to review a judgment rendered before act March 3, 1891, creating that court, was passed. (United States *v.* National Exchange Bank of Milwaukee, 53 Fed. Rep., 9.)

*When appeal does not lie to circuit court of appeals.*

- 2 (U. S. C. C. A., 1894). Section 7 of the act creating the circuit court of appeals (26 Stat. L., 828) gives no jurisdiction of an appeal from an interlocutory order dismissing a restraining order and denying an injunction. (Robinson *v.* City of Wilmington et al., 60 Fed. Rep., 469.)

*When United States circuit court has jurisdiction.*

- 3 (U. S. C. C. A., 1902). Act July 12, 1882, relating to national banks (22 Stat. L., 162, sec. 4), does not deprive a circuit court of the United States of the jurisdiction conferred by prior statutes over suits brought by receivers of such banks, without regard to the citizenship of the parties; but such jurisdiction is expressly recognized and preserved, both at law and in equity, where the suit is one by the direction of the Comptroller or for winding up the affairs of the bank, by the proviso to section 4 of the judiciary act of 1887-88. (McCartney et al., *v.* Earle, 115 Fed. Rep., 462.)

*When United States circuit court has no jurisdiction.*

- 4 (U. S. C. C.). The circuit court has no jurisdiction of a suit by a private person to restrain, interfere with, or control the Treasurer of the United States or the Comptroller of the Currency in the discharge of their duties in respect to bonds deposited with the Treasurer to secure the redemption of circulating notes of a national bank. The provisions of sections 56 and 57 of the national banking act explained. (Van Antwerp *v.* Hulburt, 7 Blatchford, 426.)

## JURISDICTION—Continued.

## WHEN FEDERAL COURTS HAVE JURISDICTION—continued.

## WHEN DISTRICT COURT HAS JURISDICTION.

- 1 (U. S. Dist. Ct.). A district court of the United States may order the receiver of a national bank to compromise doubtful debts under section 50 of the national banking act (13 Stat. L., 115), which authorizes receivers to compromise such debts "on the order of a court of record of competent jurisdiction." (Petition of Platt, 1 Benedict, 534.)
- 2 (U. S. Dist. Ct., 1880). The district court of the United States has jurisdiction of a bill in equity filed by a national bank. (Fifth National Bank of Pittsburgh v. Pittsburgh and Castle Shannon Railroad Company. (1 Fed. Rep., 190; 2 N. B. C., 190.)
- 3 (U. S. Dist. Ct., 1880). Stockholders have no standing in court to interfere for the protection of their company until the board of directors of the company have neglected or refused an application to take the proper steps to protect the interests of the company. (Ib.)
- 4 (U. S. C. C., 1880). National banks are not authorized to institute suits in the Federal courts out of the districts where they are established when the amount in controversy does not exceed \$500. (St. Louis National Bank v. Brinkman, 1 Fed. Rep., 45; 2 N. B. C., 141.)

## REMOVAL FROM STATE TO FEDERAL COURTS.

*Removal when Federal question appears from complaint.*

- 1 (U. S. C. C. A., 1896). A cause can not be removed upon the ground that it involves a Federal question unless that fact appears from the plaintiff's complaint. (Wichita National Bank et al., v. Smith, 72 Fed. Rep., 568.)

*Receiver's right of removal applies only to cases where he is a necessary party to the action.*

- 2 (U. S. C. C. A., 1900). The receiver of a national bank is a proper but not a necessary party to an action against the bank pending in a State court at the time of his appointment, and while he may properly be admitted as a party on his application to defend in behalf of his trust, such admission does not give him the right to remove the cause to a Federal court. The right of removal given him by the Federal statutes applies only to cases where he is a necessary party to the action. (Speckert v. German Bank et al., 98 Fed Rep., 151.)

*Removal of causes—Citizenship of parties.*

- 3 (U. S. C. C., 1902). Under act of August 13, 1888 (1 Supp. Rev. Stat. U. S., p. 612, sec. 2), providing for the removal from State courts to Federal courts of civil suits when the controversy is "wholly between citizens of different States, and which can be fully determined as between them," a suit by a bank for the purpose of determining to whom a deposit should be paid, against the administrator of the deceased depositor, a citizen of the State, who claims the deposit as a part of the estate of the deceased, and against a third person, a citizen of another State, who claims the deposit, is properly removed from the State court to the Federal court, for the suit is wholly between citizens of different States and can be fully determined as between them. (First National Bank v. Bridgeport Trust Co. et al., 117 Fed. Rep., 969.)

*Transposing parties.*

- 4 (U. S. C. C., 1902). It is the duty of the court to transpose the parties by placing the administrator and third person on opposite sides, and thus retain jurisdiction. (Ib.)

*Petition for removal—Joinder of husband in wife's petition.*

- 5 (U. S. C. C., 1902). The failure of the husband of the third person to join in the petition for removal is immaterial. (Ib.)



## JURISDICTION—Continued.

## REMOVAL FROM STATE TO FEDERAL COURTS—continued.

*When Federal courts have jurisdiction.*

- 6 (U. S. C. C., 1887). When a complainant invokes the protection of a law of the United States the Federal courts have jurisdiction when it is apparent that the case depends upon a construction of that law. (Richards et al. v. Incorporated Town of Rock Rapids, 31 Fed. Rep., 505.)
- 7 (U. S. C. C., 1887). A party does not waive the right of removal by remaining in the State court and contesting the case on the merits, if the State court upon due application, wrongfully refused to order a removal of the cause. (Ib.)
- 8 (U. S. C. C., 1887). The right of removal is not defeated or lost if the petition therefor is filed in the State court after motion made, the decision of which does not affect the merits of the controversy. (Ib.)
- 9 (U. S. C. C. A., 1900). Where a case is not removable when the time for its removal prescribed in the acts of Congress expires, but subsequently becomes removable by amendment or otherwise, the filing of a petition and bond for removal within a reasonable time thereafter entitles the petitioner to a transfer of the case to the Federal court. (Guarantee Co. of North Dakota v. Hanway, 104 Fed. Rep., 369.)
- 10 (U. S. C. C. A., 1900). One may waive objections to the time and manner of removal of a suit from a State to a Federal court by silently proceeding to trial upon the merits, because matters of time and method are formal and modal, and not essential to the right of removal. (Ib.)
- 11 (U. S. C. C. A., 1900). The nature of the action, and not the character of the defense to it, constitutes the test to determine whether it arises under the laws of the United States. If the determination of the claim made in the action invokes a consideration of those laws, and the effect of the acts or omissions of parties to the suit under them, it arises under the laws of the United States, whether the defense to the suit is good or bad. (Ib.)
- 12 (U. S. C. C. A., 1900). A successory trustee of a fund takes it in privity with his predecessor, and subject to suits pending against him which affect the administration of the trust. Such suits are not abated or defeated by a change of trustee. (Ib.)
- 13 (Nebr. Sup., 1899). In an action in a State court wherein a removal to a United States court under the provisions of section 2 of the act of Congress of March 3, 1887, as corrected in 1888 (see 25 Stat. L., 433), and it appears from the face of the record that the suit is not a removable one, the application does not deprive the State court of its jurisdiction. (Stuart v. Bank of Staplehurst, 1 Banking Cases, 518; 57 Nebr., 569.)

*When petition for removal must be made.*

- 14 (N. Y. Sup., 1874). Defendant served a notice of appearance on December 15, but did not file a petition for the removal of the cause from a State to the Federal court until January 7, the petition stating that defendant then entered its appearance and had not done so before. *Held*, a valid compliance with the Federal statute requiring the defendant "at the time of entering his appearance in the State court" to file his petition. (Chatham National Bank of New York v. Merchants' National Bank of West Virginia, 1 N. B. C., 769; 4 Thompson & Cook, 196.)

*What is not cause for removal.*

- 15 (U. S. Sup. Ct., 1890). A bill in equity was filed in a State court by a creditor of a partnership to reach its entire property. The prayer of the bill was that judgments confessed by the firm in favor of various defendants, some of whom were citizens of the same State with the plaintiff, might be set aside for fraud. On the allegations of the bill there was but a single controversy as to all of the defendants. One

## JURISDICTION—Continued.

## REMOVAL FROM STATE TO FEDERAL COURTS—continued.

of the defendants, who was a citizen of a different State from the plaintiff, removed the entire cause into a circuit court of the United States. After a final decree for the plaintiff, and on an appeal therefrom, this court held that the case was not removable under section 2 of the act of March 3, 1875 (18 Stat. L., 470), and reversed the decree and remanded the case to the circuit court with a direction to remand it to the State court, the costs of this court to be paid by the petitioner for removal. (*Graves v. Corbin*; *First National Bank of Chicago v. Corbin*, 132 U. S., 571.)

- 16 (U. S. Sup. Ct., 1887). The act of Congress of July 12, 1882, repealing inconsistent acts and providing that the jurisdiction of suits in which a national bank should be a party should be the same as if it were a State bank at the same place, prevents the removal of a cause in which a national bank is a party from a State to a Federal court unless a similar suit by or against a State bank in like situation could be so removed. (*Leather Manufacturers' National Bank v. Cooper, jr.*, 120 U. S., 778; 3 N. B. C., 208.)
- 17 (U. S. C. C., 1887). A national bank, sued in a State court, can not enforce the removal of the cause to the Federal court on the ground that the latter has exclusive jurisdiction. (*Pettilon v. Noble*, 7 Biss., 449; 2 N. B. C., 120.)
- 18 (U. S. C. C., 1879). Banks organized under the acts of Congress as national banks are not entitled by force of such acts to have any suit or proceeding in the State court wherein they are parties defendant removed to the Federal court. (*Wilder v. Union National Bank*, 12 Chicago Legal News, 84; 2 N. B. C., 124.)
- 19 (U. S. C. C., 1879). To authorize a removal on the ground that the controversy involves a question arising under Constitution and laws of the United States, it must fully appear from all the record that a Federal question is presented. So where, in a petition for removal to the Federal court, the defendant states that certain laws of the State of Illinois infringe upon or violate the tenth section of Article II of the Constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendants, are affected by the operation of those laws, the record does not show sufficiently that it is a case coming within the Federal jurisdiction. (Ib.)
- 20 (U. S. C. C., 1879). If the record presents a Federal question that a right of action or defense arises under the Constitution and laws of the United States, the citizenship of the parties has nothing to do with it. (Ib.)
- 21 (U. S. C. C., 1897). The E. Co., being indebted to the plaintiff, executed to it three promissory notes, and pledged certain chattels to secure their payment. Subsequently the E. Co. confessed judgment in a State court in favor of the S. bank, then in the hands of a receiver. The receiver caused an execution issued from the State court to be levied on the same chattels which had been pledged to plaintiff. Plaintiff then filed a bill in equity in the State court against the bank and its receiver, the E. Co., and the sheriff, to restrain the sale of the chattels and determine the rights of the parties. The receiver applied to remove this suit to the Federal court. *Held*, that the subject-matter of the controversy, the pledged chattels, was within the jurisdiction and control of the State court, and therefore beyond the jurisdiction of the Federal court, either original or by removal. (*Kelly, Maus & Co. v. Sioux City National Bank et al.*, 81 Fed. Rep., 3.)

## JURISDICTION—Continued.

## WHEN STATE COURTS HAVE JURISDICTION.

*In actions by and against national banks.*

1. State courts have jurisdiction of suits by and against national banking associations.  
(U. S. Sup. Ct., 1871) *First National Bank of Bethel v. National Pahquioque Bank*, 14 Wall., 383;  
(Md.) *Ordway v. Central National Bank*, 47 Md., 217.
- 2 (U. S. C. C., 1885). The tenth subdivision of section 629, Revised Statutes, which confers upon the circuit court of the United States jurisdiction of all suits by or against any national banking association established in the district for which the court is held, has been repealed by the proviso to section 4 of the act of July 12, 1882, and a national bank can not now institute and maintain a suit (in the U. S. courts) against residents of its own State and judicial district. (*National Bank of Jefferson v. Fare et al.*, 25 Fed. Rep., 209.)
- 3 (Ark., 1879). State courts have jurisdiction of questions arising under the national banking act. (*Pickett v. Merchants' Nat. Bank of Memphis*, 2 N. B. C., 209; 32 Ark., 346.)
- 4 (Ga., 1887). A national bank may be sued in a State court on an attachment bond. (*Continental National Bank v. Folsom*, 3 N. B. C., 350; 78 Ga., 449.)
- 5 (N. Y. Sup. Ct., 1882). A receiver of a national bank situated in another State, though not a party, may move to vacate an attachment. (*People's Bank of the City of New York v. Mechanics' Nat. Bank of Newark*, 3 N. B. C., 670; 62 How. Pr., 422.)
- 6 (Vt.) State courts have jurisdiction of suits brought by national banks, it not having been taken away by section 57 of the national banking act. (*First National Bank of Montpelier v. Hubbard and others*, 49 Vermont, 1.)

*Suits against national banks in State courts.*

- 7 (U. S. C. C., 1873). Where a national banking association is sued in a State court the suit must be brought in the city or county in which the bank is located. (*Cadle v. Tracy*, 11 Blatch, 101.)
- 8 (La. Sup., 1877). National banks, like other corporations and the receivers of them, may sue and be sued in the State courts of their domicile. (*Adams v. Daunis*, 29 La. Ann., 315; 1 N. B. C., 510.)
- 9 (Mass. Sup., 1869). A banking association organized under act of Congress of 1864, chapter 106, can be sued in a State court only in the city or county where it is located. (*Crocker v. Marine National Bank of New York*, 101 Mass., 240; 1 N. B. C., 575.)
- 10 (Mass.). But in a State where the holder may sue without respect to the ownership an association may bring suit upon paper so acquired. (*National Pemberton Bank v. Porter*, 125 Mass., 333; *Atlas National Bank v. Savery*, 127 Mass., 75.)
- 11 (N. Y. Sup. Ct.). The words of restriction to the place where said association is situated apply to the county and municipal courts, and not to the State courts. In the State courts of general jurisdiction a national banking association can be sued whenever an individual can be for the same cause. (*Talmage v. Third National Bank*, 27 Hun, 61.)
- 12 (N. Y. Appls., 1880). A State court has jurisdiction of an action on contract brought by a resident of the State against a national bank located in another State, and except as against a national bank which has committed or is contemplating an act of insolvency. (*Robinson v. National Bank of Newberne*, 58 How. Pr., 306; 2 N. B. C., 309.)

*Transfer of shares when no Federal question involved.*

- 13 (U. S. Sup. Ct., 1887). When the transaction of transfer of national bank shares does not present a case arising under national banking act no Federal question is involved. (*Le Sassier v. Kennedy*, 123 U. S., 521.)

## JURISDICTION—Continued.

## WHEN STATE COURTS HAVE JURISDICTION—continued.

*In actions to mandate State officers.*

- 14 (U. S. C. C., 1900). A suit against the officers of a State to compel them to do acts which would impose a contractual pecuniary liability upon the State, or to issue any evidence of debt which would have that result, is, in fact and legal effect, a suit against the State, of which a Federal court has no jurisdiction. (*Farmers' National Bank of Hudson v. Jones, Governor of Arkansas, et al.*, 105 Fed. Rep., 459.)

*In actions for money against national banks.*

- 15 (N. Y.). An action for money against a national bank whose corporate existence is admitted is not a suit arising under the laws of the United States. (*Ulster County Savings Institution v. Fourth National Bank*, 8 N. Y., 162.)

*In actions against officers of bank for deceit.*

- 16 (Ohio Superior Ct. Cin.). The State courts have jurisdiction of an action brought against the officers of a national bank to recover damages on account of alleged deceit practiced by such officers in making a false report of the condition of the bank. (*Barnes v. Swift, Superior Ct. Cin.*, 3 Ohio N. P., 291.)

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*Bank's liability as lessee for breach of contract.*

- 1 (U. S. Sup. Ct., 1896). After passing into the hands of a receiver, appointed by the Comptroller of the Currency, under the provisions of the Revised Statutes, a national bank remains liable, during the remainder of the term, for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them; but if the lessor, in the exercise of a power conferred by the lease, reenters and relets the premises, the liability of the bank after the reletting is limited to the rent then accrued and unpaid, and the diminution, if any, in the rent for the remainder of the term, after reletting. (*Chemical National Bank of Chicago v. Hartford Deposit Co.*, 161 U. S., 1.)
- 2 (U. S. C. C., 1888). Where a national bank takes a lease for a long term, its insolvency and dissolution soon afterwards and the appointment of a receiver, who refuses to take possession of the leased premises, do not entitle the lessor to damages out of the assets, the rent having been paid for the time during which the bank was in possession. (*Fidelity Safe Deposit and Trust Co. v. Armstrong*, 35 Fed. Rep., 567.)

*Contract before organization invalid.*

- 3 (U. S. Sup. Ct., 1897). By section 5136 of the Revised Statutes a contract of lease, at a large rent, of an office to be occupied "as a banking office, and for no other purpose," for the term of five years, determinable at the end of any year by either party, executed by a national bank as lessee, after having duly filed its articles of association and organization certificate with the Comptroller of the Currency, but not having been authorized by him to commence the business of banking, is void, can not be made good by estoppel, and will not support an action against the bank to recover anything beyond the value of what was actually received and enjoyed. (*McCormick v. Market National Bank*, 165 U. S., 538.)
- 4 (U. S. Sup. Ct., 1897). In an action against a national bank upon a contract, each party relied on section 5136 of the Revised Statutes, by which a national bank, upon filing its articles of association and organization certificate with the Comptroller of the Currency, becomes

## LEASE—Continued.

a corporation, with power "to make contracts" and other corporate powers, but is prohibited to "transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The defendant relied on the prohibition. The plaintiff relied on the exception to the prohibition, and also contended that, under the general power to make contracts, the contract sued on was valid as between the parties, even if contrary to the prohibition. *Held*, that a judgment for the defendant in the highest court of the State might be reviewed by this court on writ of error. (Ib.)

*National banks—Powers—Lease of property.*

- 5 (U. S. C. C. A., 1903). A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration of its charter, even though the lease is assignable only by consent of the lessor. (*Weeks v. International Trust Co.*, 125 Fed. Rep., 370.)

## LIABILITY OF BANK.

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## WHEN NATIONAL BANK MAY HAVE LIEN.

*On dividends for shareholder's debt to bank.*

- 1 (Me.). An association has equitable lien upon dividends declared for any just debt due to it from the shareholders. (*Hagar v. Union National Bank*, 63 Me., 509.)

*On its debtor's note deposited by him for collection.*

- 2 (U. S. Sup. Ct., 1900). A bank holding negotiable paper for collection does not lose its lien thereon for debts due it from the depositor by reason of the fact that the depositor becomes insolvent, makes an assignment for creditors, and goes into the hands of a receiver, even if the bank accepts the assignment, where there is nothing to show any waiver of its lien. (*Joyce v. Auten*, 3 Banking Cases, 90; 179 U. S., 591.)

## LIEN—Continued.

## WHEN NATIONAL BANK MAY HAVE LIEN—continued.

- 3 (Ark. Sup., 1896). A bank has a general lien on notes in its hands, belonging to its debtor, for the payment of the debt, whether the debtor deposited such notes to his general account or transferred them to the bank for collection. (*Cockrill v. Joyce*, 35 S. W. Rep., 221; 62 Ark., 216.)
- 4 (Ark. Sup., 1896). Where one indebted to a bank delivers notes to the cashier who asks for them that a good showing might be made to the bank examiner, the intention of the debtor being that the bank should collect the notes and place them to his credit, such bank will have a general lien on the notes for the payment of its claim. (*Ib.*)
- 5 (Mich., 1895). A bank has a lien on a note deposited for collection by a debtor before maturity of his own debt, remaining uncollected and unassigned in his hands after his debt matures, for its payment. (*Gibbons v. Hecox*, 63 N. W., 519; 105 Mich., 509.)

*Lien by express agreement.*

- 6 (U. S. Sup. Ct., 1889). The controversy in this case involves the allowance, in favor of the trustee in bankruptcy of S., of liens upon certain bonds, owned in fact by C. and D., though ostensibly belonging to C. only, as pledged to secure, by express agreement, the general balance of account of a New Orleans bank, of which C. was president; and also, by implication from the usage of the banking business in which S. was engaged, C.'s general balance. (*Reynes v. Dumont*; *Dumont v. Fry*, 130 U. S., 354.)
- 7 (U. S. Sup. Ct., 1889). The court is of the opinion upon the evidence that the bonds were pledged to secure the remittance by the bank to S. of "exchange bought and paid for"—that is, bills drawn against shipments and purchased by advances to the shippers—and that they can not be held to make good a debit balance of the bank created by the nonpayment of certain drafts drawn by it directly on Europe and unaccompanied by documents. (*Ib.*)
- 8 (U. S. Sup. Ct., 1889). A banker's lien rests upon the presumption of credit extended in faith of securities in possession or expectancy, and does not arise in reference to securities in possession of a bank under circumstances, or where there is a particular mode of dealing, inconsistent with such lien. (*Ib.*)
- 9 (U. S. Sup. Ct., 1889). The pledge of these bonds to guarantee the remittance by the bank as before stated, and the circumstances under which they were left in the possession of S. and had been made use of by C., precludes the allowance of the banker's lien claimed on behalf of S. as against the ultimate indebtedness of C. (*Ib.*)
- 10 (U. S. Sup. Ct., 1889). The receipt by D. and the assignee of C. of the remaining bonds and money realized from bonds or coupons, after the satisfaction of the amounts decreed as liens by the circuit court, did not deprive D. and C.'s assignee of the right to appeal. (*Ib.*)
- 11 (Ky. App., 1901). Where bonds were pledged to a bank to secure a specific debt the bank had no lien except for that debt. (*First Nat. Bank v. Germania Safety Vault and Trust Co.*, 4 Banking Cases, 291.)
- 12 (N. Y. App., 1883). Moller & Co., brokers and agents for Hunt, by an absolute power of attorney, having authority from her to pledge her stocks for a loan of \$35,000, contracted with defendant for the loan, giving their own note therefor, secured by pledge of the stock. Defendant knew that the loan was for Hunt, and was to be used to pay for a portion of the stocks, and that the stocks belonged to her. *Held*, that defendant could not hold the same as security for other loans made by it to M. & Co. (*Talmage v. Third National Bank of the City of New York*, 91 N. Y., 531; 3 N. B. C., 603.)
- 13 (N. Y. App., 1883). Plaintiff tendered before suit the \$35,000 and interest, and on this being refused tendered \$46,000. *Held*, not a conclusive admission that defendant had a lien for the latter sum. (*Ib.*)

## LIEN—Continued.

## WHEN NATIONAL BANK MAY HAVE LIEN—continued.

- 14 (Va. Sup. Ct. of App., 1901). A creditor may acquire by assignment an interest in insurance policies on the life of his debtor, limited solely to the amount of the latter's ability at the time of his death, together with such premiums, with interest thereon, as the creditor has paid to preserve the insurance; the residue belonging to the insured's estate whether the policies were assigned absolutely or as collateral. (First Nat. Bank of Roanoke v. Terry's Admr., 3 Banking Cases, 317; 99 Va., 194.)

*On general deposit for claim against depositor.*

- 15 (N. Y.). A bank has a general lien on all moneys and funds of a depositor in its hands, for the balance of the general account, if such account be due and payable; but where a note is discounted by a bank for its depositor, it has no resulting lien upon his funds or property until the note becomes due. (Smith v. Eighth Ward Bank, 52 N. Y. S., 200.)
- 16 (N. Y.). Where a bank held matured notes of a firm to an amount greater than the firm's deposit, it had a lien on the deposit, and was entitled to hold the same until the notes were paid. (Delehanty v. Central National Bank, 71 N. Y. S., 416.)
- 17 (Pa.). Where the payee of an accommodation check, given for a special purpose, deposits it in a bank in his own name, and the bank makes advances and extends credit on the faith of the deposit without notice of the trust, its rights and equities are superior to the drawer of the check. (Erisman v. Delaware County Nat. Bank, 1 Pa. Super. Ct., 144.)

*National bank entitled to mechanic's lien.*

- 18 (Wis. Sup., 1903). Where a subcontract was assigned by the subcontractor to a national bank as collateral security and the subcontractor died insolvent, leaving the work unfinished, the bank completing the contract, it became a subcontractor and as such entitled to a mechanic's lien. (Security Natl. Bank of Sioux City, Iowa, v. St. Croix Power Co., 94 N. W. Rep., 74; 5 B. C., 560.)

## WHEN NATIONAL BANK MAY NOT HAVE LIEN.

*On special deposit.*

- 1 (U. S. C. C., 1890). A banker's lien for the amount of the balance of its general account does not exist when the securities have been deposited with the bank for a special purpose or for the payment of a particular loan. (Armstrong v. Chemical National Bank, 41 Fed. Rep., 234.)

*On general deposit for debt not matured.*

- 2 (Mo. Sup., 1897). A bank has no lien on the deposit of a customer for an indebtedness owing to it by him, which has not matured, though he be insolvent. (Homer v. National Bank of Commerce of St. Louis, 41 S. W., 790; 140 Mo., 225.)
- 3 (N. Y.). A firm having a deposit with a bank which held unmatured notes of the firm exceeding the amount of the deposit made an assignment for the benefit of creditors, which was afterwards set aside at the suit of a judgment creditor and a receiver appointed. The judgment appointing the receiver was not recovered until after the maturity of the notes. *Held*, that the receiver was merely subrogated to the rights of the firm as of the date of his appointment, and therefore was not entitled to recover the amount of the deposit. (Delahunty v. Central Nat. Bank, 71 N. Y. S., 416.)

*On its land alleged to be, but not actually, sold.*

- 4 (U. S. C. C. A., 1896). There can be no vendor's lien in favor of a bank which causes lands held in trust for it to be conveyed to a corporation for the purpose of giving such corporation the appearance of



## LIEN—Continued.

## WHEN NATIONAL BANK MAY NOT HAVE LIEN—continued.

ownership and the power and opportunity to deal with strangers as the owner, when in reality it takes the lands in trust for the bank. There can be no vendor's lien when there is no actual sale. (*Butler et al. v. Cockrill*, 73 Fed. Rep., 945.)

*When estopped from claiming lien.*

- 5 (S. Dak. Sup., 1898). A county treasurer borrowed \$1,000 from defendant on his individual note and then deposited it to his account as county treasurer, for the ostensible purpose of taking the place of funds previously collected for the county. Thereafter the bank delivered to the treasurer drafts, including one for the \$1,000, payable to his order as county treasurer, which were exhibited by him to the county commissioners, and his accounts settled in reliance thereon. *Held*, that the bank was estopped from claiming a lien on the \$1,000 on account of the loan, or from setting up an agreement with the treasurer that, if the note was not paid in full, the balance was to be charged back to the account. (*Custer County v. Walker*, 74 N. W. Rep., 1040; 10 S. Dak., 594.)

## WHEN LIEN MAY BE HAD ON BANK'S PROPERTY OR ON PROPERTY OF OTHERS IN ITS CUSTODY.

*Garnishment of property in custody of bank.*

- 1 (Pa.). The lien of an attachment in execution takes effect at the time the writ is served on the garnishee, and can not be subsequently defeated by an assignment of the attached property to the garnishee, prior to service on defendant. (*National Bank of Spring City v. National Bank of Pottstown* (Com. Pl.), Montg. Co. Law Repr., 64.)
- 2 (Tex.). One claiming a lien on attached property, superior to the attachment plaintiff, can not, in a cross bill, traverse the affidavit for attachment. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.* (Tex. Civ. App.), 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchants' National Bank*, ib.)

*Creditor of bank may apply payment to item not secured.*

- 3 (Ohio Cir. Ct.). Where a creditor is entitled to a lien for debts represented by certain items on an open account, and is not entitled to a lien under other items, the creditor may apply a payment made on the account generally to those items under which no lien exists. (*Union National Bank v. City of Cleveland*, 10 Ohio Cir. Ct. R., 222.)

*Lien of United States.*

- 4 (La. Sup., 1870). The national banking act gives to the United States a first and paramount privilege upon all the assets of a banking association organized under the act to reimburse to the United States the amount expended in paying the circulating notes of such bank association. Therefore, the privilege given to an attaching creditor over the assets of the First National Bank of Selma must be postponed to that of the privilege of the United States where it is shown, as in this case, that the Louisiana National Bank, a debtor of the First National Bank of Selma, had notice of the claim of the United States on the assets of the First National Bank of Selma before the seizure by the creditors under the attachment. (*Schmidt v. The First Nat. Bank of Selma*, 1 N. B. C., 505; 22 La. Ann., 314.)

## MISCELLANEOUS.

*Possession essential to factor's lien.*

- 1 (Ill. Sup., 1893). A contract between a corporation and its factor, whereby the corporation appoints the factor its general selling agent and agrees to consign all its products to him, does not give the latter a lien for advances on money due the corporation for goods sold and

## LIEN—Continued.

## MISCELLANEOUS—continued.

delivered by the corporation directly to the purchaser, since possession is essential to a factor's lien. (*Warren v. First National Bank of Columbus*, 38 N. E., 122; 149 Ill., 9.)

*Mortgage on merchandise, stock replaced.*

- 2 (Md., 1894). A mortgage of a stock of goods, providing that all stock replaced after the sale of any of the stock conveyed should be substituted therefor and be liable for the debt, is ineffectual to create a lien on after-acquired goods. (*First National Bank of Baltimore v. Lindenstruth*, 28 A., 807; 79 Md., 136.)

*Waiver of lien by holders of preferred stock.*

- 3 (Md. App., 1901). Where stockholders holding preferred stock, issued pursuant to code, article 23, section 297, to enable the company to obtain a loan, consent, by indorsement on the certificate, to postpone their lien in favor of any banks making loans to the company, such banks, on the company becoming insolvent, are entitled to share as unsecured creditors on the full amount of their claims, and then pro rata in the proceeds of the property, subject to the lien of the preferred stock, after deducting the percentage previously received in common with other creditors. (*Rogers et al. v. Citizens' Nat. Bank et al.*, 49 Atl. Rep., 843; 93 Md., 613.)

*Mechanics' liens, builders' contract.*

- 4 (N. Y. Sup.). Where a building contract makes a certificate from the county clerk that no liens are unsatisfied of record an absolute condition of payment of any money under the contract, and does not expressly limit the protection of this provision to the owners of the building, such provision is also for the benefit of persons entitled to mechanics' liens, and an assignment of moneys due under the contract will be subject to the satisfaction of any such liens duly filed after such assignment, and before such certificate is obtained. (27 N. Y. S., 951, affirmed; *Bates v. Salt Springs National Bank*, 34 N. Y. S., 598.)

*Record of deed giving lien not essential.*

- 5 (Tex., 1895). A vendor's lien expressly reserved in deed is not affected by failure to record the deed or by its destruction after record. (*Texarkana National Bank v. Daniel* (Tex. Civ. App.), 31 S. W., 704.)

*Lien of judgment may not be collaterally attacked.*

- 6 (W. Va., 1895). In a suit in equity to enforce a judgment lien against real estate of the debtor, the judgment is, as between the judgment creditor and other judgment creditors of the debtor, conclusive of the justness and amount of the debt, and can not be impeached except for fraud. (*First National Bank of Ceredo v. Huntington Distilling Co.*, 23 S. E., 792; 41 W. Va., 530.)

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GENERALLY.

- 1 (U. S. C. C. A., 1895). Under act March 3, 1891, section 11, a writ of error must be sued out within six months in order to authorize a review by the circuit court of appeals. (White et al. v. Iowa National Bank of Des Moines, 71 Fed. Rep., 97.)
- 2 (U. S. C. C., 1879). Where the State and Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court; and in such cases the Federal courts will follow the decisions of the local State tribunals and will administer the same justice which a State court would administer between the same parties. (Price v. Yates, 2 N. B. C., 204; 19 Alb. Law Journal, 295.)
- 3 (U. S. C. C., 1887). The time of commencement of judicial proceedings to avoid a statute bar may be shown by parol. (Witters, receiver. v. Sowles and others, assignees, 32 Fed. Rep., 765.)
- 4 (Nebr. Sup., 1900). A claim against the estate of a deceased person must be presented for examination and allowance to the probate judge or commissioners appointed for that purpose within the time allowed by statute, as fixed by order of the probate court. (Schaberg's Estate v. McDonald, 3 Banking Cases, 164; 60 Nebr., 493.)

*In action for conversion.*

- 5 (U. S. C. C., 1900). The cashier of a bank, as agent for a school district, resold bonds which he had redeemed on behalf of the district, and converted the proceeds to his own use, stating to the directors that he had been unable to obtain such bonds. The directors were also negligent in failing to make inquiry from third persons, which would have disclosed the facts. *Held*, that limitation began to run against an action by the district to charge the bank from the time of the conversion. (School Dist. of City of Sedalia, Mo., v. De Weese, 100 Fed. Rep., 705.)

*Concealment of cause of action by defendant.*

- 6 (U. S. C. C., 1900). Fraud or concealment which will prevent the running of limitation against an action must be that of the defendant. (School Dist. of City of Sedalia, Mo., v. De Weese, 100 Fed. Rep., 705.)
- 7 (Iowa Sup. Ct., 1901). Where plaintiff sued to recover money deposited in a bank without his knowledge to his credit, but which he did not receive in the settlement of his account, and which the bank's president told him had not been made, the cause of action was not barred

## LIMITATION OF ACTIONS—Continued.

## GENERALLY—continued.

in the statutory period after the fraud or mistake; but under code, section 3448, providing that in actions for fraud or mistake the cause of action shall not accrue until discovery, the statute did not begin to run against his cause of action until he discovered the error. (*Cole v. Charles City Nat. Bank*, 4 Banking Cases, 5; 114 Iowa, 632.)

*Bills and notes—Limitations—Payments—Authority.*

- 8 (U. S. C. C., 1904). Defendant made a note payable to his wife, which she indorsed, and defendant's son, who was a director in the bank of which plaintiff was the receiver, procured it to discount the note, the money being paid to defendant. Thereafter payments of interest within the period of limitations were made by the son directing the cashier of the bank to apply the dividends due to defendant's wife on certain shares of the bank's stock standing in her name; but there was no evidence tending to connect defendant with such payments, except the declaration of the bank's cashier, as a witness, that the son was acting as his father's agent throughout the transaction. *Held*, that the evidence was insufficient to show that the payments of interest were made with defendant's authority and consent, and were therefore insufficient to stop the running of limitations as against him. (*Schofield v. Twining*, 127 Fed. Rep., 488.)

## LIQUIDATION.

*Holders of two-thirds of stock may force liquidation.*

- 1 (Kans.). A national bank may go into voluntary liquidation and be closed by a vote of two-thirds of its shareholders, although contrary to the wishes and against the interests of the remainder. (*Watkins v. National Bank of Lawrence*, 32 P., 914; 51 Kans., 254.)

*Corporate existence continues until business settled.*

2. A national bank which has gone into voluntary liquidation will continue to exist as a body corporate for the purpose of suing and being sued until its affairs are completely settled.  
(U. S. Sup. Ct., 1881) *National Bank v. Insurance Company*, 104 U. S., 54; 3 N. B. C., 20;  
(Md.) *Ordway v. Central National Bank*, 47 Md., 217.
- 3 (U. S. Sup. Ct., 1881). A national bank in voluntary liquidation may still sue and be sued by its name for the purpose of closing its business, and a creditor may maintain a suit upon a disputed claim, although he has filed a bill under the act of June 30, 1876, section 2, to enforce the individual liability of shareholders. (*National Bank v. Insurance Company*, 104 U. S., 54; 3 N. B. C., 20.)
- 4 (Minn. Sup., 1889). A two-thirds vote of the shareholders to go into liquidation does not dissolve a national bank. While it may not go on with the banking business, it still has power to collect its assets and close its affairs. (*Merchants' Nat. Bank v. Gaslin*, 41 Minn., 552; 43 N. W. Rep., 483.)

*Authority of officers during liquidation.*

- 5 (U. S. Sup. Ct., 1890). The officers of a national bank which has gone into liquidation having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders. (*Schrader v. Manufacturers' Nat. Bank*, 133 U. S., 67.)
- 6 (U. S. Sup. Ct., 1887). After an association goes into liquidation there is no authority on the part of its officers to transact any business in its name so as to bind its shareholders, except that which is implied

## LIQUIDATION—Continued.

in the duty of liquidation, unless such authority has been expressly conferred by the shareholders. (*Richmond v. Irons*, 121 U. S., 27.)

- 7 (Kans.). Without express authority from the shareholders in a national bank, its officers, after the bank goes into liquidation, can only bind them by acts implied by the duty of liquidation. (*Elwood v. First Nat. Bank*, 41 Kans., 475.)

*National bank in liquidation subject to like proceedings as domestic corporations.*

- 8 (Ga.). A national bank which has gone into voluntary liquidation becomes subject to like proceedings as domestic corporations; for instance, to a creditor's bill to reach a fund held by the president. (*Merchants and Planters' National Bank v. Masonic Hall*, 65 Ga., 603.)

*Comptroller may appoint receiver.*

- 9 (U. S. C. C., 1893). The Comptroller may appoint a receiver for a bank that has voted to go into voluntary liquidation. (*Washington National Bank of Tacoma v. Eckels*, 57 Fed. Rep., 870.)

*When court will appoint receiver during liquidation.*

- 10 (U. S. C. C., 1875). Where a bank has gone into voluntary liquidation and the Comptroller has no power to appoint a receiver, a proper court, in a case where such action is necessary to protect the interests of a creditor, will appoint a receiver for it. (*Irons, executor, et al. v. Manufacturers' National Bank*, 6 Biss., 301.)
- 11 (Kans.). Where a national bank is insolvent and in process of voluntary liquidation, and its affairs are being greatly mismanaged by its managing agents, to the injury of its creditors and stockholders, and some of the creditors and stockholders are being favored to the injury of others, a receiver may be appointed in such a case, even where the bank only has been made a defendant. (*Elwood v. First National Bank*, 41 Kans., 475.)

*Stockholders of liquidating corporation have the right to have the assets converted into money.*

- 12 (U. S. Sup. Ct., 1889). On the dissolution of a corporation at the expiration of the term of its corporate existence, each stockholder has the right as a general rule and in the absence of a special agreement to the contrary, to have the partnership property converted into money whether such sale be necessary for the payment of debts or not. (*Mason v. Pewabic Mining Co.*, 133 U. S., 50.)

*Directors responsible for their acts after expiration of charter.*

- 13 (U. S. Sup. Ct., 1889). Directors of a corporation conducting its business and receiving moneys belonging to it after the expiration of the term for which it was incorporated will be held to an account on the dissolution and the final liquidation of the affairs of the corporation in a court of equity. (*Ib.*)

*Bills receivable may be transferred to creditors.*

- 14 (U. S. Sup. Ct.). A bank in process of liquidation may pay creditors in bills receivable and other assets of the bank, which may be transferred by the president or cashier by indorsement or otherwise, but such indorsement, and the use of the name of the bank, is in liquidation and merely for the purpose of transferring title, as the bank can not guarantee the paper and it does not constitute a liability for which the shareholders can be held individually responsible.

(U. S. Sup. Ct., 1890) *Schrader v. Manufacturers' National Bank*, 133 U. S., 67;

(U. S. Sup. Ct., 1887) *Richmond v. Irons*, 121 U. S., 27; 3 N. B. C., 211.

*Nature of action to recover assessment.*

- 15 (U. S. Sup. Ct., 1887). A court of equity has jurisdiction, under the national banking act, of an action brought by one creditor on behalf

## LIQUIDATION—Continued.

of all the creditors to enforce the liability of the shareholders and carry out the liquidation proceedings. (*Richmond v. Irons*, 121 U. S., 27; 3 N. B. C., 211.)

- 16 (U. S. C. C. A., 1902). The only authorized procedure for enforcing the individual liability of the shareholders of a national bank which has gone into voluntary liquidation is by a bill in equity in the nature of a creditor's bill, brought by a creditor "on behalf of himself and of all other creditors of the association." The trustee appointed by the stockholders has no authority to enforce this liability. The suit must be brought in the district in which the bank is situated. (*Williamson et al. v. American Bank et al.*, 115 Fed. Rep., 793.)

*Interest on deposits.*

- 17 (U. S. Sup. Ct., 1887). If a national bank goes into voluntary liquidation, the book accounts of depositors draw interest from the date of suspension, the act of going into liquidation dispensing with demand. (*Richmond v. Irons*, 121 U. S., 27.)

*Maladministration, character of action for.*

- 18 (U. S. Sup. Ct., 1887). Under the original act respecting national banks, and before the act of June 30, 1876, a court of equity had jurisdiction of suit to prevent or redress maladministration or fraud against creditors, in voluntary liquidation of such bank, whether contemplated or executed; and such suit by one creditor must be for all. (*Richmond v. Irons*, 121 U. S., 27.)

*Voluntary liquidation—Shareholders' liability—Court's receiver may enforce.*

- 19 (U. S. C. C. A., 1903). Under the act of June 3, 1864, c. 106 (13 Stat., 99), authorizing the formation of national banks, a Federal court sitting in equity had jurisdiction in a proper case to appoint a receiver to liquidate its obligations and to authorize him to collect and to enforce by action the liability of the shareholders of the bank under section 12 of the act (sec. 5151, Rev. Stat.; U. S. Comp. St., 1901, p. 3465.) (*King v. Pomeroy*, C. C. of App., 121 Fed. Rep., 287.)

*Receiver—Has rights of creditors as well as debtors.*

- 20 (U. S. C. C. A., 1903). In the absence of restrictive legislation a receiver in liquidation proceedings may ordinarily enforce the rights of creditors as well as the rights of the debtor. (*Ib.*)

*New remedy—Cumulative, not exclusive.*

- 21 (U. S. C. C. A., 1903). While a remedy given by the act creating the right is ordinarily exclusive, a new remedy provided in a case in which the right and an appropriate remedy already existed is merely cumulative, and the injured party is at liberty to pursue either. (*Ib.*)

*Voluntary liquidation—Remedy of creditors' suits not exclusive.*

- 22 (U. S. C. C. A., 1903). The remedy of the creditors' suit to enforce the liability of shareholders of national banks in voluntary liquidation, provided by section 2 of the act of June 30, 1876, c. 156 (19 Stat., 63 U. S. Comp. St., 1901, p. 3509), is cumulative and not exclusive. (*Ib.*)

*Action of Comptroller, when unnecessary.*

- 23 (U. S. C. C. A., 1903). In cases in which a court of equity appoints a receiver to liquidate the debts of national banks in voluntary liquidation, no action of the Comptroller is requisite to empower the court's receiver to enforce the liability of the shareholders. The court has plenary power to ascertain the necessity of enforcing the liability, and to direct its receiver to collect it. (*Ib.*)

*Shareholders' liability—Statute of limitations.*

- 24 (U. S. C. C. A., 1903). The statute of limitations does not run against an action to enforce the liability of a shareholder of a national bank during the time while proper liquidation proceedings are pending in a court of equity. (*Ib.*)

## LIQUIDATION—Continued.

- 25 (U. S. C. C. A., 1903). The liability of a shareholder of a national bank whose affairs are in course of judicial administration in a court of equity does not mature until the court ascertains the necessity of enforcing it, determines the amount which the shareholder must pay, and fixes the time of payment; and the cause of action of the receiver of the court to enforce the liability does not accrue until the liability thus matures. (Ib.)

*Solvent national bank assumes debts of insolvent bank contemplating liquidation—Liability of shareholders of insolvent bank.*

- 26 (U. S. C. C. A., 1904). Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stockholders were liable, as provided by Rev. Stat., 5151. (George et al. v. Wallace; Brownlee et al. v. Same; Morsman v. Same; Poppleton v. Same; Morton et al. v. Same; McCague Inv. Co. et al. v. Same, 135 Fed. Rep., 286.)

*Trust funds.*

- 27 (U. S. C. C. A., 1904). The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agent is a trust fund for the primary benefit of creditors. (Ib.)

*Capacity to sue—Necessity of judgment.*

- 28 (U. S. C. C. A., 1904). All of the assets of an insolvent national bank in process of voluntary liquidation having been placed in the hands of a defendant, who by express contract, was constituted a trustee for the primary benefit of another national bank, which became a creditor of the liquidating bank by the assumption and payment of the demands of all of the other creditors of the liquidating bank, complainant, the holder of the note executed by the liquidating bank as a part of the assumption contract sued to enforce an asserted lien by way of pledge on all of the undisposed assets of the liquidating bank, to obtain a judicial administration of its affairs, and to enforce the statutory obligation of stockholders. Held, that it was no objection to complainant's capacity to sue that his claim had not been reduced to judgment. (Ib.)

*Garnishment during liquidation.*

- 29 (Ala.). A national bank may be garnished after it has gone into liquidation. (Birmingham Nat. Bank v. Mayor, 104 Ala., 634; 16 So. Rep., 526.)

*Judgments against bank during liquidation.*

- 30 (Kans.). A judgment rendered against a national bank after it has gone into voluntary liquidation, and to dissolve which proper steps have been taken, is void, and may be attacked collaterally. (Hodgson v. McKinstry, 42 Pac. Rep., 929; 3 Kans. App., 412.)
- 31 (Tex. Civ. App., 1898). A judgment against a national bank which had gone into voluntary liquidation is valid. (Cage v. Shappard, 46 S. W. Rep., 839; 19 Tex. Civ. App., 206.)

*When creditors held to be paid.*

- 32 (Kans.). Creditors of a national bank, who, after it suspends payment and goes into voluntary liquidation, receive in settlement of their claims bills receivable, indorsed or guaranteed in the name of the bank by its president, can not claim as creditors against the shareholders, as the original debt is paid. (Elwood v. First Nat. Bank, 41 Kans., 475.)

*Election of officers for the purpose of effecting liquidation.*

- 33 (Mass. Sup., 1889). Under the act of Congress of July 12, 1882, extending for the purpose of liquidation the franchises of such national banking

## LIQUIDATION—Continued.

associations as do not extend the periods of their charters, and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation; but after the expiration of the term of its charter the stock of such an association is not transferable, so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder, is ineligible as a director under Revised Statutes, section 5145. (*Richards v. Attleboro National Bank*, 148 Mass., 187; 3 N. B. C., 495.)

*Who entitled to dividends during liquidation.*

- 34 (Me.). Dividends of a national bank in process of liquidation belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not, and must be paid to the holder of such shares on demand. (*Bath Sav. Inst. v. Sagadahoc Nat. Bank*, 89 Me., 500; 36 Atl. Rep., 996.)

*Agent may sue on notes during liquidation.*

- 35 (Minn. Sup., 1889). The appointment of trustees to wind up the affairs of the bank, in whom title to the assets does not vest and who are merely the agents of the corporation, does not affect the rights of a national bank to maintain suits on its choses in action. (*Merchants' Nat. Bank v. Gaslin*, 41 Minn., 552; 43 N. W. Rep., 483.)

- 36 (Tex.). A national bank in the process of liquidation may by its agent maintain suit against a stockholder on his unpaid notes held by the bank, and such suit may be brought before the bank's affairs are closed. (*Norwood v. Interstate Nat. Bank of Texarkana*, 48 S. W. Rep., 3; 92 Tex., 268.)

*Court may order exhibition of books to stockholders.*

- 37 (N. Y. Appls., 1902). The Supreme Court has power, in its discretion, to compel the officers of a national bank in process of liquidation, on expiration of its charter by limitation, to exhibit books, papers, and assets of the bank to the stockholders, and to permit them to examine and take extracts therefrom. (*Tuttle et al. v. Iron Nat. Bank of Plattsburg et. al.*, 62 N. E. Rep., 761; 4 Banking Cases, 300; 170 N. Y., 9.)

*When trustee may buy bank's property.*

- 38 (Tex. Civ. Appls., 1898). One of the liquidating trustees of a national bank may purchase at a sale of the assets of the bank, where he is also a stockholder, and the sale is made on notice to all the stockholders and the bank is solvent. (*Cage v. Shappard*, 46 S. W. Rep., 839; 19 Tex. Civ. App., 206.)

- 39 (Wash. Sup., 1905). When a national bank goes into voluntary liquidation it thereby ceases to do business as a going concern, and is not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee. (*Muir v. Citizens' National Bank of Fairhaven*, 80 Pac. Rep., 1007.)

## LOANS.

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## LOANS—Continued.

## VIOLATIONS OF SECTION 5200, REVISED STATUTES UNITED STATES.

*Permanent deposit in another bank a loan within this enactment.*

- 1 (U. S. Sup. Ct., 1870). Placing by one bank of its funds on permanent deposit with another is a loan within enactment forbidding loans on security of banks' capital stock. (*First National Bank of South Bend v. Lanier*, 11 Wall., 369.)

*Loans in excess of limit valid and collectible.*

2. Section 5200, Revised Statutes, which provides that the total liabilities to any association or any person, etc., shall not exceed one-tenth part of the capital stock paid in, was intended only for the guidance of the association, and, though its franchises may be liable to forfeiture for violation of the law, the association may recover of the borrower the full amount of the loan.

(U. S. Sup. Ct., 1877) *Union Gold Mining Co. v. Rocky Mountain National Bank*, 96 U. S., 640; 1 N. B. C., 169;

(U. S. Cir. Ct.) *Shoemaker v. The National Mechanics' Bank*, 2 Abb. U. S., 416;

(U. S. Cir. Ct.) *Stewart v. National Union Bank of Maryland*, 2 Abb. U. S., 424;

(Pa.) *O'Hare v. Second National Bank of Titusville*, 77 Penn. St., 96.

- 3 (U. S. Sup. Ct., 1877). Loans to any person or company in excess of one-tenth part of the capital stock of a national bank are not void, and in an action to recover such loans the defendant can not interpose the defense that they were in violation of the national-bank act. (*Union Gold Hill Mining Co. v. Rocky Mountain National Bank*, 96 U. S., 640.)

- 4 (U. S. C. C., 1869). Loans by a national bank to an individual or company in excess of one-tenth of its paid-up capital are not void. The loan may be collected, though the bank is exposed to forfeiture of its franchise and the officers participating are declared personally liable. (*Stewart v. The National Union Bank of Maryland*, 2 Abb. U. S., 424; 1 N. B. C., 175.)

- 5 (Ill. Sup., 1901). The fact that a debtor owed a bank a sum amounting to more than one-tenth of the paid-in capital of the bank does not render such debt uncollectible and void, under *Starr & C. Ann. St. 1896*, ch. 16a, par. 13, providing that the total liabilities of any person to any association shall at no time exceed one-tenth part of the amount of capital of such association actually paid in. (*Murry Nelson & Co. v. Leiter*, 4 Banking Cases, 14. See note at the end of case.)

- 6 (Mass. Sup., 1888). The prohibition of Revised Statutes, section 5200, that the total liabilities of any national bank to any person, company, corporation, or firm for money borrowed, including in them "the liabilities of the several members thereof, shall at no time exceed one-tenth part" of the capital stock actually paid in does not prevent a bank from recovering of a person to whom it has lent a sum greater than 10 per cent of its capital stock the excess of the loan over such limit. (*Corcoran v. Batchelder*, 147 Mass., 541; 3 N. B. C., 491.)

- 7 (Pa.). A note is not illegal because at the time it was discounted by the association the maker was indebted to the association in a sum equal to more than one-tenth part of its capital. (*O'Hare v. Second National Bank of Titusville*, 77 Penn. St., 96.)

*Government only can have forfeiture declared.*

- 8 (U. S. C. C., 1887). Revised Statutes, section 5200, providing that the amount for which any one individual or firm shall be indebted to a national bank shall not exceed a certain sum when such a bank violates the provision by lending to one person an amount in excess of the limit, such a person can not set up the violation of the statute as a defense to his liability on the note. If a penalty is to be enforced

## LOANS—Continued.

## VIOLATIONS OF SECTION 5200, REVISED STATUTES UNITED STATES—continued.

against the bank, it can be done only at the instance of the Government. A contract entered into by the bank in violation of this section is not void. (*Wyman v. Citizens' National Bank of Faribault*, 29 Fed. Rep., 734.)

*Bankruptcy—Provable claims—Notes unlawfully discounted by bank cashier.*

- 9 (U. S. Dist. Ct., 1902). Where the cashier of a national bank, without the knowledge and against the orders of the other officers, discounted for the maker notes far in excess of the amount which the bank could legally loan to one person, and beyond the ability of the maker or indorser of such notes to pay, the facts that he was prosecuted and sentenced to imprisonment for misapplying the funds of the bank, and the maker of the notes for aiding and assisting him, and that the receiver for the bank sued and recovered on the cashier's bond the amount of the penalty therein, do not affect the validity of the notes, nor the bank's ownership thereof; and the receiver may prove the same in bankruptcy against the estate of the indorser, where proper steps were taken to fix his liability thereon. (In re Edson, 119 Fed. Rep., 487.)

*Not cause for enjoining transfer of notes.*

- 10 (Kans.). And a court of equity will not enjoin an association, at the instance of the borrower, from transferring to innocent third persons notes and securities, on the ground that the notes represent part of a loan made in excess of 10 per cent of the capital of the association. (*Elder v. First National Bank of Ottawa*, 12 Kans., 238.)

*May not be attacked by third person.*

- 11 (Nebr.). A mortgage given a bank could not be attacked by a third person on the ground that it was ultra vires of the bank to take such security, or that the loan made by the bank, which the mortgage secured, was more than 10 per cent of the bank's capital. (*Smith v. First National Bank of Chadron*, 63 N. W., 796; 45 Nebr., 444.)
- 12 (Pa. Sup., 1895). The loaning by a national bank to an individual of more than the national banking law allows can not be taken advantage of either by the debtor or another creditor of his. (*McCartney v. Kipp*, 33 A., 233; 171 Pa. St., 644.)

*What not a violation of section 5200, Revised Statutes.*

- 13 (Ohio). Where a State bank makes a loan to one person of an amount in excess of one-tenth part of its capital, and is afterwards converted into a national bank, it may, after conversion, extend the time for payment of such loan without violating section 5200, Revised Statutes. (*Allen v. The First National Bank of Xenia*, 23 Ohio St., 97.)

## VIOLATIONS OF SECTION 5201.

- 1 (U. S. Sup. Ct., 1903). The mere statement by a borrower from a national bank, made to the president when the loan is obtained, that his stock in the bank is security for the loan, there being no delivery of the certificates, does not amount to a pledge of the stock, nor does it give the bank any lien thereon as against one subsequently loaning on the stock in good faith and receiving the certificates as collateral. (*Third Nat. Bank of Buffalo v. Buffalo German Ins. Co.*, 193 U. S., 581.)
- 2 (U. S. Sup. Ct., 1903). The provisions of section 36 of the national banking act of 1863, empowering the withholding of transfer of the stock of a shareholder indebted to the bank, were not only omitted from the national banking act of 1864, but were expressly repealed thereby. (Ib.)
- 3 (U. S. Sup. Ct., 1903). A provision in the charter and by-laws, and a condition in a certificate of stock, of a national bank, forbidding the

## LOANS—Continued.

## VIOLATIONS OF SECTION 5201—continued.

transfer of stock where the stockholder is indebted to the bank, is void as repugnant to the national banking act and in conflict with the public policy embodied in that act, and creates no lien which the bank can enforce by refusing to transfer the stock to a holder for value in good faith. (Ib.)

- 4 (U. S. Sup. Ct., 1903). A condition in a certificate of stock of a national bank which is void under the national banking act will not operate as a notice to one loaning on the stock as collateral that it is subject to a lien of the bank which will affect the right of the pledgee of having the stock transferred to him. (Ib.)

## VIOLATIONS OF SECTION 5202, REVISED STATUTES UNITED STATES.

*What not a violation of section 5202.*

- 1 (U. S. C. C. A., 1894). Revised Statutes United States, section 5202, providing that no national bank shall be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in, except on circulation, deposits, special funds, or declared dividends, does not prohibit a national bank from incurring indebtedness up to the amount of its paid-up capital, for any purpose within its powers, no matter what may be the amount of its debt or liability upon demands within such four classes. (*Weber v. Spokane National Bank*, 64 Fed. Rep., 208.)

*Validity of debt contracted in violation of the statute.*

- 2 (U. S. C. C. A., 1894). An indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by Rev. Stat. U. S., 5202, or is even incurred in violation of the positive prohibition of the law in that regard. (Ib.)

## MISCELLANEOUS.

*When transaction a deposit and not a loan.*

- 1 (U. S. C. C., 1898). Where a national bank receives State funds subject to check, agreeing to pay interest on daily balances, the transaction is a deposit and not a loan. (*State of Nebraska v. First National Bank of Orleans*, 88 Fed. Rep., 947.)
- 2 (U. S. C. C., 1877). A national bank loaned money and took stock in a corporation as collateral security therefor. *Held*, that it had not exceeded its power. (*Canfield v. The State National Bank of Minneapolis*, 1 N. W. Rep., 173; 1 N. B. C., 312.)

*Duty of bank when loan is deposited.*

- 3 (U. S. C. C., 1898). A bank which discounts the notes of a corporation depositor and credits the proceeds to its account is not bound, in order to protect the validity of the notes, to see that the money when paid out on checks of the corporation, drawn in the regular course of business, is properly applied to the uses of the corporation. (*First National Bank of Hailey v. G. V. B. Min. Company*, 89 Fed. Rep., 439.)

*What national bank may take as security.*

- 4 (U. S. C. C., 1875). National banks may take personal chattels (e. g., a locomotive) as security for loans and discounts. (*Pittsburg Locomotive and Car Works v. State Nat. Bank of Keokuk*, 1 N. B. C., 315; 2 Central Law Journal, 692.)

*Bank may not loan money specially deposited.*

- 5 (Ark., 1897). As a national bank has no authority to loan the money of other persons, it is not liable for a loan made by its cashier for a depositor, even though the loan was made as the result of a conspiracy with the president with intent to defraud the depositor. (*Grow v. Cockrill*, 39 S. W., 60; 63 Ark., 418.)

## LOANS—Continued.

## MISCELLANEOUS—continued.

*When transaction a purchase and not a loan.*

- 6 (Minn., 1896). Where, for a debt actually due him, a creditor held the note of a debtor, which he discounted, indorsed, and delivered to a bank at a rate of discount greater than the rate of interest allowed by law, but no greater than the rate provided for in the note, the transaction was not necessarily a loan, in which the note was delivered as collateral. (*Becker's Investment Agency v. Rea*, 65 N. W., 928; 63 Minn., 459.)

*Cashier's authority to make loan, estoppel.*

- 7 (N. Y. Sup.). Where a bank has received the proceeds of a discount, and used them, it can not dispute its cashier's authority to apply for the discount. (*Tradesmen's National Bank v. Bank of Commerce*, 39 N. Y. S., 554.)

*When bank may recover unauthorized loan.*

- 8 (N. Y. App., 1888). Where a national bank which is a depository of the funds of a municipality, acting by its president, makes in absolute good faith, and in pursuance of a custom of the banks of the city, advances not authorized by law to a commission for building a courthouse upon checks regularly drawn and indorsed, and the legislature, by a subsequent act, authorizes the repayment of such advances, the bank can recover the full amount with interest, although a part of the money so advanced was fraudulently misappropriated by certain of the city officials who were also directors in the bank. (*Mayor, etc., of New York v. Tenth National Bank*, 111 N. Y., 446; 3 N. B. C., 655.)

- 9 (Tex., 1896). A national bank, having joined with other persons in a partnership to operate a mill, can not be prevented from recovering moneys loaned to the firm on the ground that it had no power to become a partner in the mill. (*Cameron v. First National Bank of Decatur* (Tex. Civ. App.), 34 S. W., 178; 4 Tex. Civ. App., 309.)

*Acceptance of stocks or bonds, payment of loans.*

- 10 (Tex. Civ. App.). The promoters of a railroad corporation on their individual credit borrowed money of banks, which was used in constructing the road, and paid themselves by stock issued to them. They afterwards caused to be issued by the company 200 bonds of \$2,000 each, and turned over to such banks \$134,000 of the bonds in payment of the money borrowed, the banks having knowledge of the facts. *Held*, that the banks acquired such bonds without consideration. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.*, 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchants' National Bank*, *ib.*)

*Violation of directions as to loan of special deposit.*

- 11 (Utah Sup., 1901). A complaint alleging that plaintiff made a special deposit with defendant bank, to be loaned on real estate, but that the bank loaned it to H. without any security, and knowing that he was insolvent, is sufficient to support a recovery for fraud on the part of the bank in procuring H., who was indebted to it, to execute a new note to plaintiff, and thereupon transferring the amount of the loan from the plaintiff's account to that of the bank. (*Larsen v. Utah Loan and Trust Co.*, 65 Pac. Rep., 208; 3 Banking Cases, 634; 23 Utah, 449.)

## MANDAMUS.

## CROSS REFERENCES:

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## MANDAMUS—Continued.

*When the proper remedy.*

- 1 (U. S. Sup. Ct., 1894). Mandamus is the proper remedy when a mandate of the United States Supreme Court has been disregarded. (In re City National Bank of Fort Worth, 153 U. S., 246.)
- 2 (U. S. Sup. Ct., 1894). Compliance with a mandate of this court which leaves nothing to the judgment or discretion of the court below may be enforced by mandamus. (City National Bank of Fort Worth v. Hunter, 152 U. S., 512.)
- 3 (U. S. C. C., 1896). Where a judgment recovered in a State court against a county is assigned to a citizen of another State, the assignee may sue thereon in the proper Federal court, although the original judgment is still in force. The assignee has a right to have judicially determined its right to enforce payment of the indebtedness, and the action is not to be considered as brought merely to vex defendant. (First National Bank of Buchanan County v. Deuel County, 74 Fed. Rep., 373.)
- 4 (U. S. C. C., 1896). If, as alleged, the assignee's only remedy is a mandamus to compel the levy of a tax, then it has a right to obtain a judgment in the Federal court to enable it to invoke the power of that court in the granting and enforcement of the mandamus proceeding. (Ib.)

*Allegations of petition.*

- 5 (Ind., 1902). The petition for mandamus and the alternative writ to compel a bank to allow an inspection of its books by the tax assessor under Burn's Revised Statutes, 1894, section 8444, are insufficient, they proceeding on the theory that he can examine the account of any depositor regardless of whether he is bound to pay taxes in the State and not alleging what taxpayer had omitted to make returns of deposits therein, or that any taxpayer who was a depositor therein had omitted to make proper return. (Applegate v. State ex rel. Bowling, 63 N. E. Rep., 16; 4 Banking Cases, 295; 158 Ind., 119.)

*When will not lie.*

- 6 (U. S. C. C., 1900). A bill in equity to compel a board of public officers to issue bonds to plaintiff is, in effect, a petition for a peremptory mandamus, and neither can be maintained unless the act sought to be coerced is a purely ministerial one, enjoined on the defendants by positive requirements of law, which leaves nothing to their discretion. (Farmers' Nat. Bank of Hudson v. Jones et al., 105 Fed. Rep., 459.)
- 7 (U. S. C. C., 1900). Act Arkansas, May 8, 1899, which authorizes and directs the State debt board to fund the valid bonded indebtedness of the State by exchanging new bonds for outstanding valid bonds, which shall be presented by the holders, confers no power on such board to issue new bonds in lieu of old bonds which have been lost or destroyed, even though they were erroneously destroyed by the officers of the State; nor can such power be conferred by a court on equitable grounds, the only remedy of the creditor being through legislation. (Ib.)
- 8 (Ohio Sup., 1894). Mandamus does not lie to compel the officers of a private corporation to issue stock to a person entitled thereto. (State v. Carpenter, 37 N. E., 261; 51 Ohio St., 83.)
- 9 (Ohio Sup., 1894). When the officers of a corporation refuse, on demand, to issue a certificate of stock to a person entitled thereto, the remedy is by action for damages, or to enforce the issue and delivery of such certificate in equity, rather than by mandamus. (Ib.)

*Appeal, jurisdiction.*

- 10 (U. S. Sup. Ct., 1894). This court can not entertain an appeal from a judgment executing its mandate if the value of the matter in dispute upon the appeal is less than \$5,000. (City Nat. Bank of Fort Worth v. Hunter, 152 U. S., 512.)
- 11 (U. S. Sup. Ct., 1894). No appeal lies from a decree for costs. (Ib.)

## MARRIED WOMEN.

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*Married women.*

- 1 (U. S. Sup. Ct., 1890). A married woman in the District of Columbia may become a holder of stock in a national banking association and assume all the liabilities of such a shareholder, although the consideration may have proceeded wholly from the husband. (*Keyser v. Hitz*, 133 U. S., 138.)
- 2 (U. S. C. C., 1889). In Vermont a married woman is competent to become a stockholder in a corporation and to contract to charge her separate property with the payment of any liability which is implied from entering into that relation. (*Witters v. Sowles and wife*, 38 Fed. Rep., 700.)
- 3 (N. Y.). A national banking association may take as security for a loan the indorsement of a married woman, charging her separate estate. Such security is to be treated as personal security, within the meaning of the banking law, and not as a mortgage. (*Third National Bank v. Blake*, 73 N. Y., 260.)

## MORTGAGE.

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## IN GENERAL.

*Subrogation.*

- 1 (U. S. Sup. Ct., 1892). M. gave to a bank a mortgage on land owned by him to secure paper which the bank might discount. Among the paper so discounted was a note made by J. which M. had discounted, and which J. paid to the bank. The note had been given for a certificate of deposit which J. afterwards indorsed and subsequently paid. J. claimed subrogation under the mortgage to the rights of the bank as respected the certificate of deposit. *Held*, that the claim could not be allowed; that the payment of the note to the bank by J. discharged the mortgage, so far as it was a security for the note, and that the certificate of deposit was not secured by the mortgage. (*Underwood v. Metropolitan National Bank*, 144 U. S., 669.)

*When mortgage valid under bankrupt law.*

- 2 (U. S. C. A., 1901). A mortgage given by a bankrupt within four months prior to his bankruptcy, in order to constitute a valid lien under bankruptcy act, 1898, section 67d, must have been given or

## MORTGAGE—Continued.

## IN GENERAL—continued.

accepted in good faith, and not in contemplation of, or in fraud upon, the act, and "for a present consideration." Where a mortgage so given was in part for a present consideration and in part as security for a renewal of an antecedent debt previously secured by a mortgage, which was void as against other creditors because not recorded, it constitutes a valid lien to the extent of the new consideration, but is voidable as a preference to the extent that the notes secured were based upon the prior debt. (*City National Bank of Greenville v. Bruce*, 109 Fed. Rep., 69.)

*When decree is final and appealable.*

- 3 (U. S. C. C. A., 1901). A decree which determines the invalidity of a trust deed is final and appealable as to the trustee and beneficiary in such deed, although it is interlocutory only as to other matters involved in the suit, in which such parties have no interest. (*Kemp et al. v. National Bank of the Republic of New York*, 109 Fed. Rep., 48.)

*Liability of bank officer for false statement to depositor—Mortgage given to depositor to indemnify him from loss occasioned by said false statement held valid.*

- 4 (U. S. C. C. A., 1901). An officer of a bank can not avail himself of the statute of frauds, requiring a promise to answer for the debt of another to be in writing to sustain an action thereon, to protect him from liability arising from a false and fraudulent statement made by him to a depositor in regard to the condition of the bank, by reason of which the depositor suffered loss. (*Kemp et al. v. Nat. Bank of the Republic of New York*, 109 Fed. Rep., 48.)
- 5 (U. S. C. C. A., 1901). Creditors can not invoke the statute of frauds to defeat a liability of their debtor, which he has himself recognized by giving his notes and security therefor. (*Ib.*)
- 6 (U. S. C. C. A., 1901). A county treasurer, who was a large depositor of public money in a national bank, applied to the president for information as to the bank's condition, and was by him assured that the bank was solvent and able to pay all its indebtedness. It was in fact insolvent, as the president knew, and subsequently failed, and the depositor was obliged to individually make good to the county the amount lost through his deposit. Thereafter the president, who was also insolvent, without the knowledge of the depositor, executed to him his individual notes, secured by a trust deed for the amount so lost. *Held*, that such notes and deed were supported by a legal consideration, which was the liability of the maker for the loss sustained by reason of his false and fraudulent statement, and were valid as against his other creditors. (*Ib.*)

*Representations by assignor of mortgage, estoppel.*

- 7 (U. S. C. C. A., 1901). One who sells notes secured by a second mortgage, falsely representing such mortgage to be a first lien, can not invoke the record of a prior mortgage held by himself as notice to the purchaser, but as between them the purchaser is entitled to priority of lien. (*Zeis v. Potter et al.*; *Potter et al. v. Zeis*, 105 Fed. Rep., 671.)

*Fraud on creditors—Withholding mortgage from record—Enhancement of credit—Allowance of mortgage debt in bankruptcy.*

- 8 (U. S. C. C. A., 1903). Code Georgia, 1895, sections 2724, 2727, require mortgages to be recorded, and provide that a failure to record will postpone them to subsequent lienholders and purchasers. Section 2695 provides that every conveyance or contract made to defraud creditors, such intention being known to the party taking, shall be void, but a bona fide transaction, without ground for reasonable suspicion, shall be valid. A storekeeper who had done business with a bank for twenty years executed mortgages to it covering his entire property, consisting of realty, and also his stock in trade then existing and to be acquired. The mortgages were withheld from record,

## MORTGAGE—Continued.

## IN GENERAL—continued.\*

though the storekeeper and bank president both denied any agreement therefor. The storekeeper purchased goods, referring his vendors to a rating in a mercantile agency which he had given without mentioning the mortgages. He filed a voluntary petition in bankruptcy, and on the same day and hour, in response to notice thereof by telephone, the bank recorded the mortgages. The bank president testified that he had no reason to suspect the storekeeper's insolvency until three or four days before his bankruptcy, but admitted that he knew that the recording of the mortgages would have destroyed the storekeeper's credit, and that he knew the mortgagor was going to New York to buy goods, and that the purpose of keeping the mortgages off the record was not to impair his credit. *Held*, that the mortgage debts were not entitled to priority in the bankruptcy proceedings over the claims of the vendors subsequently selling goods to the storekeeper. (*Clayton et al. v. Exchange Bank of Macon*; *In re Josephson*, 121 Fed. Rep., 630.)

*Mortgage of wife's property to secure extension of debt.*

- 9 (Ga., 1895). A mortgage given by a wife on her separate estate in settlement of a debt of her husband is not binding on her, though she gave it under the impression that the creditor could, for some reason, subject the property to payment of the debt, and intended, in giving it, to effect a compromise of what she regarded as a doubtful claim against her property. (*First National Bank of Cartersville v. Bayless*, Ga., 23 S. E., 851; 96 Ga., 684.)

*Insufficient defenses to mortgages.*

- 10 (Iowa, 1892). Where the description of property covered by a mortgage is found to have been inserted before the execution and delivery of the mortgage, and the mortgage is otherwise complete, the defense can not be made to a foreclosure that certain collaterals, which were to have been embraced in the mortgages, had been omitted in violation of mortgagors' rights. (*Des Moines National Bank v. Harding*, 53 N. W., 99; 86 Iowa, 153.)

*Landlord's mortgage of his interest in growing crops.*

- 11 (Iowa, 1896). A landlord who is to receive as rent for a farm a share of the crop, to be delivered by the tenant, has such an interest in the crop that he may, before its division, make a valid mortgage thereon, which will attach to his share as soon as segregated, and will take precedence of a garnishment of the tenant by the creditor of the landlord after the execution of the mortgage. (*Riddle v. Dow*, 66 N. W., 1066; 98 Iowa, 7; *Thompson National Bank v. Dow*, *ib.*)

*Mortgage to defraud creditors.*

- 12 (Kans. Sup., 1896). A mortgage taken for the purpose of defrauding creditors of a mortgagor is not merely voidable as to such creditors, but is void. (*First National Bank of Concordia v. Marshall*, 43 P., 774; 56 Kans., 441.)

*Who may not object to indefiniteness of mortgages.*

- 13 (Mich., 1895). An objection as to indefiniteness of a chattel mortgage, sufficiently certain as between the parties, can not be raised by one who had acquired no valid lien on the property. (*First National Bank of Manistee v. Marshall & Ilsley Bank of Milwaukee*, 65 N. W., 604; 108 Mich., 114.)
- 14 (Mich., 1895). In an action between two parties claiming property under chattel mortgages from different persons the court properly refused to direct a verdict for defendant on the ground that plaintiff's mortgage was not on file when the defendant extended credit to its mortgagor, it appearing the plaintiff's mortgagor was the owner of the property when plaintiff's mortgage was given, and the evidence not being conclusive that defendant's mortgagor ever succeeded to the rights in the property of plaintiff's mortgagor. (*Ib.*)



## MORTGAGE—Continued.

## IN GENERAL—continued.

*Bona fide holder of mortgage note purchased by bank.*

- 15 (Nebr. Sup., 1876). Notes secured by mortgages were assigned to a national bank and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a bona fide purchaser. (*Richards v. Kountze*, 4 Nebr., 200; 1 N. B. C., 652.)
- 16 (Nebr. Sup., 1876). In the absence of evidence showing the purpose and object of the assignment to the bank it can not be presumed that it was for a debt created in presenti in violation of the national banking act. (*Ib.*)
- 17 (Nebr. Sup., 1876). Semble, that the limitations of the national banking act apply to transactions in real property, independent of legitimate banking operations, and not to mortgage securities. (*Ib.*)

*Release of sureties by extension.*

- 18 (N. Y.). Giving a chattel mortgage to secure an overdue note, the time of payment of which is by terms of the mortgage extended for thirty days, such mortgage to remain after the overdue note is paid, as additional security for the payment of several demand notes already secured by a real-estate mortgage, does not postpone payment of the demand notes for any definite time, so as to discharge the sureties thereon. (*Fallkill National Bank v. Sleight*, Sup., 37 N. Y. S., 155.)

*Effect of record of mortgage on rights of parties.*

- 19 (N. Y. Sup.). In replevin by a chattel mortgagee against a purchaser at an execution sale of the mortgaged chattels plaintiff's right to recover is not affected by the fact that the mortgage was not filed as required by statute, where it appears that the sale was made subject to the rights of the mortgagee. (*Potter v. Traders' National Bank*, Sup., 23 N. Y. S., 1079.)
- 20 (Wash., 1893). A creditor, on receiving a mortgage on his debtor's stock of goods, immediately went to the latter's store and told the clerks and others present that he had taken possession under the mortgage, putting one of the clerks in charge, and he proceeded forthwith to the county seat to record the mortgage. Before the mortgage was recorded an attachment was levied on the goods, though the officer making such levy was informed at the time that the property was in plaintiff's possession under his mortgage. *Held*, that plaintiff's mortgage was good as against the attachment, though the attaching creditor had no notice of the mortgage at the time the writ was issued. (*First National Bank of Aberdeen v. Carter*, Wash., 33 P., 824; 6 Wash., 494.)

*Indemnity mortgage inures to benefit of all sureties.*

- 21 (Oreg., 1896). Where one of several sureties, after all have signed, but before the debt has been paid, obtained a mortgage from the principal as indemnity, it inures to the benefit of his cosureties. (*Farmers and Traders' National Bank of La Grande v. Snodgrass*, Oreg., 45 P., 758; 29 Oreg., 395.)

*Effect of release of part of mortgaged property.*

- 22 (Tex., 1896). A mortgagee of chattels who releases a part of the mortgaged property is not thereby precluded from enforcing his mortgage upon the remainder as against another creditor whose rights are in no way prejudiced by such release. (*Ballinger National Bank v. Bryan*, Tex. Civ. App., 34 S. W., 451; 12 Tex. Civ. App., 673.)

*Remedy of mortgages of real estate.*

- 23 (Wash.). Where notes payable at different times and secured by a mortgage are assigned to different persons there is no priority of right under the mortgage between the assignees in the absence of express stipulation, but each is entitled to share pro rata in the proceeds of

## MORTGAGE—Continued.

## IN GENERAL—continued.

the mortgaged property. (First National Bank of Aberdeen v. Andrews et al.; Young v. Same, 34 P., 913; 7 Wash., 261.)

*Release of mortgage to bank by resolution of directors.*

24 (Wis. Sup., 1901). A mortgage to a bank is released without being delivered up where the directors of the bank pass a resolution releasing it, holding the personal security only, to enable the mortgagor to improve the property and he does so and conveys the property, and no claim is made on the mortgage until ten years later, and then by the bank's assignee. (In re Bank of West Superior, Goodvin v. Nichols, 85 N. W. Rep., 501; 3 Banking Cases, 322; 109 Wis., 672.)

25 (Wis. Sup., 1901). The act of the directors of a bank in releasing a mortgage by resolution may be proved by parol, witness testifying that he did not think this action appeared on the records, and there being no evidence that it did so appear. (Ib.)

## FORECLOSURE.

*Foreclosure when mortgagor adjudged a bankrupt.*

1 (U. S. C. C. A., 1901). A decree was entered in a State court foreclosing a first and second mortgage on real estate and ordering its sale. Before the time fixed for the sale creditors filed a petition against the mortgagors on which they were adjudicated bankrupts. Such creditors also filed a bill in the circuit court of the United States on which they obtained an injunction restraining further proceedings for the sale of the mortgaged property by the State court. Thereafter the mortgagees joined in a petition to the court of bankruptcy asking that the property be sold by the trustee for payment of their liens, and such sale was ordered and made, the proceeds received being insufficient to pay the mortgage debts. On petition of the trustee the court ordered the first mortgage paid from the proceeds, but displaced the second in favor of the costs and expenses incurred in both the bankruptcy proceedings and the injunction suit, including fees allowed to counsel for the creditors and trustee. No other assets of the bankrupt came into the hands of the trustee. *Held*, that such order was erroneous, except in so far as it directed payment of the costs incurred in selling the property, including the compensation to the trustee not exceeding that to which the master in the State court would have been entitled. (Ridgley Nat. Bank v. Matheny, 105 Fed. Rep., 754.)

2 (U. S. C. C. A., 1901). Under bankruptcy act, 1898, sections 40, 48, providing that referees and trustees in bankruptcy shall be entitled to commissions on "dividends" paid by the estate, they are not entitled to commissions on sums paid to mortgagees from the proceeds of the mortgaged property on its sale by order of the court of bankruptcy, such sums not being dividends within the meaning of the statute. (Ib.)

*Foreclosure of mortgage held as collateral.*

3 (Minn., 1895). A complaint, in an action to foreclose a mortgage held as collateral, against the principal debtor and the mortgagor, which set out the mortgage note, which had been assigned to plaintiff, and also the note of the principal debtor, and demanded judgment against the mortgagor and the principal debtor for a deficiency, was not demurrable, on the ground that it united different causes of action. (First National Bank of Hastings v. Lambert, 65 N. W., 451; 63 Minn., 263.)

*Foreclosure of mortgage given to predecessor State bank.*

4 (Nebr. Sup., 1879). A national bank organized as successor to a State bank may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note and assigned to it by the State bank on the formation of the national bank. (Scofield v. State National Bank of Lincoln, 9 Nebr., 316; 31 Am. Rep., 412; 2 N. B. C., 280.)

## MORTGAGE—Continued.

## CONSTRUCTION OF STATE STATUTES.

*Iowa statute construed.*

- 1 (U. S. C. C., 1895). The Iowa statute provides that corporations organized thereunder must, by their articles of incorporation, fix a maximum of indebtedness, which shall not exceed two-thirds of their capital stock; this provision not to apply, however, where corporate bonds are issued and secured "by an actual transfer of real-estate securities," which shall be a first lien on unencumbered real estate, worth at least twice the amount loaned thereon. (McClain's Code, sec. 1611.) *Held*, that the execution and delivery by the corporation of a mortgage on its own real estate to secure bonds was a transfer of real-estate securities within the meaning of the statute. (First National Bank of Montpelier v. Sioux City Terminal Railroad and Warehouse Co. (Trust Co. of North America, Intervener), 69 Fed. Rep., 441.)
- 2 (U. S. C. C., 1895). A terminal and warehouse company executed a lease of its property for a term of one hundred years, and shortly afterwards mortgaged the same to secure an issue of bonds. The lease and mortgage mutually referred to each other, and the lease contained a provision, with an express covenant by the lessee, for the payment to the trustee under the mortgage of so much of the rental as was necessary to pay interest on the bonds and the costs of the trusteeship. *Held*, that the two instruments were to be construed in *pari materia*, and that consequently the lease was not a prior incumbrance to the mortgage, within the meaning of a statute requiring corporate bonds to be secured by mortgage upon unincumbered real estate. (McClain's Code, sec. 1611.) (Ib.)
- 3 (U. S. C. C., 1895). Upon a question as to whether property mortgaged by a corporation was worth twice the amount of the bonds secured by the mortgage, as required by statute, *held*, that where it appeared that the bonds were sold in open market for from 90 to 95 cents on the dollar, in cash, it could not be held that the security, at the time it was given, did not meet the statutory requirement. (Ib.)
- 4 (U. S. C. C., 1895). The fact that a trust deed to secure bonds was not in strict accordance, in some particulars, with the resolution authorizing it, is not sufficient ground for holding it invalid, where, subsequent to its execution, the board of directors recognized its existence and validity by directing the issuance of the amount of bonds which the deed was given to secure. (Ib.)
- 5 (U. S. C. C., 1895). Where a corporation executed a lease for one hundred years, and shortly afterwards a mortgage of the same property, and the two instruments mutually referred to each other, so as to be in *pari materia*, *held*, that there was no ground for a contention that the estate created by the mortgage could not take effect until the expiration of the lease, and that consequently the mortgage was void, as creating a perpetuity. (Ib.)

*Wyoming statute construed.*

- 6 (U. S. C. C., 1896). An instrument which on its face purports to be a mortgage of personal property, by a firm, but is invalid as such because not executed by all the members of the firm, as required by the Wyoming act of 1890, is not effective in any way, either as conveying the entire interest of the firm in the partnership property or of the individual members who have signed it. (Ridgely et al. v. First National Bank, 75 Fed. Rep., 808.)
- 7 (U. S. C. C., 1896). Nor can the instrument be ratified by the partner whose name was omitted. (Ib.)
- 8 (U. S. C. C., 1896). A purchaser from the mortgagor may attack a mortgage as void because not properly executed. (Ib.)

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## GENERALLY.

*Paper held to be negotiable.*

- 1 (U. S. Sup. Ct., 1890). The maker executed in the State of Illinois and delivered to the promisee a series of notes, one of which was acquired by a bona fide indorsee, and was as follows: "\$5,000. Chicago, Ill., January 20, A. D. 1884. For value received, four months after date the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company, of Stillwater, Minnesota, five thousand dollars, at First Nat. Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid. This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13000 to 13249, inclusive, and marked on the side thereof with the words and letters 'Blue Line, C. & E. I. R. R. Co. ;' and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars. No. 1. Geo. B. Burrows, vice-president. Countersigned by E. D. Buffington, treas." *Held*, (1) that this was a negotiable promissory note according to the statute of Illinois, where it was made, as well as by the general mercantile law; (2) that its negotiability was not affected by the fact that the title to the cars for which it was given remained in the vendor until all the notes of the same series were fully paid, the title being so retained only by way of security for the payment of the notes, and the agreement for the retention for that purpose being a short form of chattel mortgage; (3) that its negotiability was not affected by the fact that it might, at the option of the holder and by reason of the default of the maker, become due at a date earlier than that fixed. (*Chicago Railway Equipment Company v. Merchants' National Bank of Chicago*, 136 U. S., 268.)
- 2 (U. S. C. C., 1900). A certificate of deposit in the ordinary form, payable to the order of the depositor, is a negotiable instrument possessing the qualities of a negotiable promissory note. (*Bank of Saginaw v. Title and Trust Co. of Western Pennsylvania*, 105 Fed. Rep., 491.)
- 3 (N. Y. App., 1896). Where the note of a corporation is negotiable in form, the affixing of the corporate seal does not destroy its negotiability. 25 N. Y. S., 447, affirmed. (*Chase National Bank v. Faurot*, 44 N. E., 164; 149 N. Y., 532.)
- 4 (Tex. Civ. App., 1898). The fact that a promissory note is payable "on or before" a certain date does not affect its negotiability. (*Gill v. First Nat. Bank*, 1 Banking Cases, 28.)

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

*When Federal courts do not follow State courts.*

- 5 (U. S. Sup. Ct., 1880). The courts of the United States, in determining questions of general commercial law, are not controlled by the decisions of a State court, even in an action instituted by a national bank, located in a State rendering such decision, against one of its own citizens upon a negotiable note there executed and payable. Such decisions not based upon local legislative enactments are not "laws" within the meaning of the Federal statute, which provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." (*Brooklyn City and Newtown R. R. Co. v. National Bank of the Republic*, 102 U. S., 14.)

*Conversion of collaterals as a defense.*

- 6 (U. S. C. C. A., 1895). In an action on a note, plaintiff averred that it had made a valid sale of securities pledged for the note, and had credited the proceeds on the note, and prayed a judgment for the amount of the note, less such credit. Defendant pleaded that the alleged sale was unlawful, and that, as plaintiff had wrongfully appropriated the securities pledged, defendant was entitled to a credit for their full value. *Held*, that defendant was not bound to tender the amount due on his note, as a condition precedent to making such defense. (*Rush v. First National Bank of Kansas City*, 71 Fed. Rep., 102.)
- 7 (U. S. C. C. A., 1895). The wrongful act complained of by the defendant's answer was so connected with the transaction set forth by plaintiff as to constitute a valid counterclaim under General Statutes of Kansas, 1889, paragraph 4178. (*Ib.*)
- 8 (Pa. Sup., 1892). Where a note given a bank by one indebted to it was signed by the debtor's sister on the bank's representation that a further loan would be made the debtor, but no such loan was made, and the note was held merely as collateral security, it was a defense that the note was diverted from the purpose for which it was signed, and an inquiry could not be made as to whether the use which was made of the note was more disadvantageous than that stipulated would have been. (*Second National Bank of Altoona v. Dunn*, 25 A., 80; 151 Pa. St., 228; *Gardner v. Same*, *ib.*, 81 and 82; 151 Pa. St., 228.)

*Invalid consideration as defense.*

- 9 (U. S. C. C. A., 1896). A note given in part in consideration of an agreement to refrain from bidding at a public sale of goods by a statutory assignee is invalid, except in the hands of an innocent purchaser. (*Atlas National Bank v. Holm et al.*, 71 Fed. Rep., 489.)

*Indorser on back of note before delivery a maker.*

- 10 (U. S. C. C., 1885). A third party who places his name upon the back of a negotiable promissory note at the time of its execution by the maker and before its delivery to the payee will be liable as a joint maker, and the note itself, with the indorsement thereon, is prima facie evidence of such liability. *Good v. Martin*, 95 U. S., 90, followed. (*First National Bank of Worcester, Mass., v. Lock-Stitch Fence Co. and others*, 24 Fed. Rep., 221.)
- 11 (U. S. C. C., 1885). The question of the liability of such a party is one of general commercial law, and the decisions of the courts of the State in which the note is executed and made payable are not necessarily controlling in the decision thereof by a United States court. (*Ib.*)
- 12 (U. S. C. C. A., 1895). By the general commercial law parties who place their names on the back of a promissory note, before its delivery, for the purpose of giving credit to the maker, are joint makers of the note, and will be so treated in the Federal courts, though the note is

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

- made in a State whose courts hold such parties to be indorsers. (Phipps et al. v. Harding, 70 Fed. Rep., 468.)
- 13 (U. S. C. C. A., 1895). The several States are not without power to change by statute the general commercial law, but each State has the right to impose such conditions and limitations upon contracts not inhibited by the terms of its own or the Federal Constitution, as it may see proper. (Ib.)
- 14 (U. S. C. C. A., 1895). The Massachusetts statute (St. 1874, c. 404) providing that "all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to notice of nonpayment thereof the same as indorsers," is a valid exercise of the power to change the general commercial law, and becomes a term of the contract, evidenced by a note made in Wisconsin while such statute was in force, and delivered and payable in Massachusetts. (Ib.)
- 15 (La.). An indorser of a note, whether a surety or an indorser in the strict mercantile sense, will be released if, without his consent, the holder releases the maker of the note, though at maturity of the note he waived demand, notice and protest. (Union National Bank of New Orleans v. Grant, La., 18 So., 705; 48 La. Ann., 18.)
- 16 (Mich. Sup., 1901). Where a note was made payable to the order of plaintiff, who instituted a suit against it for one of the original signers, the fact that it was nonnegotiable, and that the names of some of the original signers were written on the back of the note, was immaterial, since all the parties were makers. (Dow Law Bank v. Godfrey, 85 N. W. Rep., 1075; 3 Banking Cases, 530; 126 Mich., 521.)
- 17 (N. Y. Appls., 1896). Defendant indorsed a note payable to himself, and gave it to his agent, to be delivered to one S., after the latter should have procured the execution of a certain contract; but the agent gave S. the note before receiving the contract, on S.'s promise that he would procure its execution that day. S. failed to keep his promise, and sent the note to brokers, who sold it to plaintiff before maturity. *Held*, that as the note had a legal inception defendant could not avail himself of his agent's mistake and S.'s bad faith as a defense against the bona fide holder. (Chase National Bank v. Faurot, 44 N. E. Rep., 164; 149 N. Y., 532.)
- 18 (N. Y.). One who indorses a note payable to another before its delivery to the payee is presumed to be liable as a subsequent indorser. (Lincoln National Bank v. Butler (City Ct. N. Y.), 36 N. Y. S., 1112.)
- 19 (Nebr., 1893). A person other than a payee, who signs his name in blank upon the back of a promissory note at the time of its execution, and before its delivery to the payee, is, as to a subsequent bona fide holder for value, liable thereon as a joint maker, and not as accommodation indorser. (Salisbury v. First National Bank of Cambridge City, Nebr., 56 N. W., 727; 37 Nebr., 872.)

*Suit on lost instrument, bond.*

- 20 (U. S. C. C. A., 1900). A court of law—especially one which is vested with jurisdiction both at law and in equity—has power to require a plaintiff to give a bond of indemnity as a condition precedent to a recovery in an action brought therein on a lost negotiable instrument. (First National Bank of Denver v. Wilder, 104 Fed. Rep., 187.)
- 21 (U. S. C. C. A., 1900). The payee of a negotiable instrument, who claims to have lost the same before maturity, but that it had not been indorsed, should not be allowed to recover thereon against the maker without giving reasonable indemnity, unless the evidence that the paper has been actually destroyed is so cogent that there is practically no risk of its reappearance. A finding of the jury in such an action that the instrument was not negotiated, but was lost while undorsed, is not in itself a ground for dispensing with the require-

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

ment of indemnity, since it would not be available to the maker as a defense against an action by a third person who produced the instrument properly indorsed. (Ib.)

*When surety not released by extension given to maker.*

22 (Mo.). Payment of interest in advance on a note is not of itself evidence of an agreement for the extension of time of payment sufficient to release a surety from liability. (*American National Bank v. Love*, 62 Mo. App., 378.)

23 (Wash., 1894). Where the payee of a note, in extending time of payment to the maker, reserves his rights against the sureties, the latter are not discharged, though they are not notified of the fact. (*Boston National Bank of Seattle v. Jose*, 38 P., 1026; 10 Wash., 185.)

*Renewal of note raises no presumption of payment.*

24 (Wash., 1894). The fact that a bank takes a note in place of one which has matured raises no presumption that the note was taken in payment of the other, but the question of payment is one of fact, depending on the intention of the parties. (Ib.)

*Bank's ratification of officer's unauthorized contract.*

25 (Nebr., 1896). A note executed by stockholders of a corporation in the corporate name, without authority of the directors, becomes a corporate liability if ratified by the corporation by permitting judgment to go against it on the note. (*Nebraska National Bank of York v. Ferguson*, Nebr., 68 N. W., 370; 49 Nebr., 109.)

26 (Oreg., 1895). A bank by suing on a note taken by its cashier under a contract made by him ratifies the contract in toto, though he was unauthorized to make it. (*La Grande National Bank v. Blum*, Oreg., 41 P., 659; 26 Oreg., 49.)

*Effect of material alteration after delivery.*

27 (N. Dak., 1894). Erasing from a note after delivery the words "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees," is a material alteration which renders the note void, since without such words the note is negotiable. (*First National Bank of Decorah v. Laughlin*, 61 N. W., 473; 4 N. Dak., 391.)

28 (Pa., 1895). Where a note was altered after delivery by an agent of the payee, without the maker's knowledge, by an interlineation of the words "with interest at 6 per cent," which occupied only half a line and appeared to have been interlined, no recovery could be had thereon by a subsequent holder for value of either interest or principal alone. (*Gettysburg National Bank v. Chisholm*, 32 Atl. Rep., 730; 169 Pa. St., 564.)

29 (Tex. Sup., 1896). Where the maker of a note previously indorsed for his accommodation alters the same without the indorser's consent, by adding the words "with interest at 10 per cent per annum," there being at the time the maker received it no blank space for the insertion of interest nor words indicating that interest should be expressed, the note will be invalid, as against the accommodation indorser, even in the hands of a bona fide holder. (*Farmers and Merchants' National Bank v. Novich*, 34 S. W., 914; 89 Tex., 381.)

*Procuring signature to blank paper and writing note above.*

30 (Iowa, 1894). Where a person induces another to sign a paper containing no writing and which is to be used merely as a means of identifying the signer, who does not intend to execute a note or contract of any kind, and then fills out the blanks so as to make the paper a note, the note will be void even in the hands of an innocent holder. (*First National Bank of Grand Haven v. Zeims*, 61 N. W., 483; 93 Iowa, 140.)

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

*When certificate of deposit a promissory note.*

- 31 (Mich., 1895). The plaintiff received from defendants the following certificate: "B. has deposited in this bank \$8,000 (eight thousand dollars), payable to the order of himself on the return of this certificate properly indorsed. Interest at 6 per cent, if left twelve months, for all future months. Interest to cease if not renewed at end of one year from date." *Held*, that such a certificate of deposit is a promissory note, payable on demand. (Beardsley v. Webber, 62 N. W., 173; 104 Mich., 88.)

*Authority of corporate officer to indorse note, presumed.*

- 32 (Wash., 1896). The possession of a negotiable note payable to a corporation, and bearing the indorsement of such corporation, regular in form, and signed by its general manager, is prima facie sufficient to show that the officer so indorsing the note had authority to do so and to entitle the holder thereof to recover. (Citizens' National Bank of Tacoma v. Wintler, 45 P., 38; 14 Wash., 558.)

*Effect of guaranty written on back of note.*

- 33 (Wash., 1896). The fact that a guaranty is written on the back of a note, above the signature of the payee, does not have the effect of preventing the signature from operating as an indorsement, for the purpose of passing the legal title to the note. (National Bank of Commerce of Tacoma v. Galland, 45 P., 35; 14 Wash., 502.)

*When administrator personally liable.*

- 34 (Mont., 1896). An administrator is personally liable on a note, signed by him as such, the proceeds of which were placed with the payee, a bank, and paid out on checks drawn by him to pay, generally, bills and debts of the estate. (First National Bank of White Sulphur Springs v. Collins, 43 P., 499; 17 Mont., 433.)

*Attorney's fees.*

- 35 (Fla. Sup., 1901). A count in a declaration alleging that a third person executed his certain promissory note, payable to the order of defendant; that defendant indorsed and delivered said note to a certain bank, whereby she promised to pay the bank \$100 for attorney's fees in the event that the note was not paid at maturity, and was placed in the hands of an attorney for collection; that the note was not paid at maturity, and had been placed in the hands of an attorney for collection, does not show a liability for attorney's fees on the part of defendant to the bank, or to one claiming through it. (Robinson v. Aird, 3 Banking Cases, 309; 29 So. Rep., 633; 43 Fla., 30.)
- 36 (Fla. Sup., 1901). An ordinary indorsement of a note does not carry with it an original obligation to pay attorney's fees for collecting the note; and, without notice of its dishonor, the indorser will not be liable upon such indorsement for attorney's fees stipulated in the face of the note to be paid by the maker. (Ib.)
- 37 (Miss., 1894). An agreement by the maker of a note to pay 10 per cent commission, if the note be not paid at maturity, and is collected by an attorney is valid. (Brahan v. First National Bank of Clarksville, 16 So., 203; 72 Miss., 266.)
- 38 (Tex., 1895). The obligation imposed by a provision in a note for the payment of 10 per cent attorney's fees is not affected by the fact that it was inserted for the sole benefit of the payee and not with any purpose of paying the amount to an attorney. (Sturgis National Bank v. Smyth, 30 S. W., 678; 9 Tex. Civ. App., 540.)
- 39 (Wash., 1893). The amount of attorney's fees stipulated in a note to be paid in case suit is brought may be added to the amount of the judgment recovered on the note, under Code Proceedings, section 803, expressly authorizing the allowance of such fees. (Exchange National Bank of Spokane v. Wolverton, 39 P., 248; 11 Wash., 108.)



## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

*Contribution between coobligors.*

- 40 (Tex. Sup., 1896). An obligor in a note who pays a sum in excess of his pro rata share to the obligee in consideration of his full discharge is entitled to contribution from each of his coobligors of their pro rata share of the excess so paid. (*Merchants' National Bank v. McAnulty*, 33 S. W., 963; 89 Tex., 124.)

*Duty of assignee to assignor in order to charge latter.*

- 41 (W. Va., 1895). An assignee of an invalid nonnegotiable draft who relies on its invalidity as excusing him from attempting by suit to collect the money must notify his assignor of his reason for not suing and offer to return the instrument to him; and if he is guilty of negligence therein, to the assignor's damage, he can not recover the consideration of the assignment. (*Merchants' National Bank v. Spates*, 23 S. E., 681; 41 W. Va., 27.)

*Right of assignee to sue.*

- 42 (Ill.). The assignment of a promissory note vests the legal title in the assignee and renders him a proper party plaintiff in an action thereon. (*Forster v. Second National Bank*, 61 Ill. App., 272.)

*What an assignor impliedly warrants.*

- 43 (W. Va., 1895). One who assigns a nonnegotiable draft by indorsement and delivery thereof impliedly warrants its validity, his right to assign, that it is a subsisting, unpaid debt, and the solvency of the debtor. (*Merchants' National Bank v. Spates*, 23 S. E., 681; 41 W. Va., 27.)

*One holding himself out as partner liable as such.*

- 44 (Ky., 1894). A note signed by only one member of a firm was binding upon both members. *Held*, that the fact that such note is renewed after the death of the nonsigning member does not release his estate from liability on the original note, the payee not having intended to release him, and having canceled the original note through inadvertence. (*National Exchange Bank of Lexington v. Wilgus's Executors*, 25 S. W., 2; 95 Ky., 309.)
- 45 (Mo. Sup., 1894). The course of business between members of a firm may show the authority of one partner to act for and charge the firm. (*Midland National Bank v. Schoen*, 27 S. W., 547; 123 Mo., 650.)
- 46 (Mo. Sup., 1894). Where a partner is invested with general authority to use the firm name on notes for his individual purposes, the firm is liable on notes discounted on the faith of such authority. (Ib.)
- 47 (Mo. Sup., 1894). Where a note is given by a firm for the debt of one partner it may be renewed by any one of the partners without altering the firm's liability. (Ib.)
- 48 (Mo. Sup., 1894). Where a partner has general authority to give notes of the firm for his private debts it is not necessary to show special authority on the particular notes sued on. (Ib.)
- 49 (Pa. Sup., 1894). One who, by his acts and declarations in dealing with a bank, holds himself out to it as a member of a firm, thus inducing the bank to discount notes and pass the proceeds to the credit of the firm, will be liable to the bank on the notes as a member of the firm. (*Lancaster County National Bank v. Boffenmyer*, 29 A., 855; 162 Pa. St., 559.)

*When law where note is payable governs.*

- 50 (U. S. C. C. A., 1894). A note executed and delivered in one State and payable in another is governed, as to defenses against an indorsee, by the law of the latter State, though sued on in the State wherein it was executed. (*Sturdivant v. Memphis National Bank*, 60 Fed. Rep., 730; ib., 736.)

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

*Filling blanks in notes.*

- 51 (Me.). If one signs a printed blank for a note and intrusts it to another to have the blanks filled up, he confers the right, and the note carries on its face an implied authority to fill up the blanks at pleasure, so far as is consistent with the printed words. As to all purchasers for value without notice, the person to whom the blank note is intrusted must be deemed the agent of the signer; and an oral agreement between such principal and agent, limiting the amount for which the note shall be perfected, can not affect the rights of an indorsee who takes the note for a different amount, before maturity, for value, in ignorance of such agreement. (Market and Fulton National Bank v. Sargent, 27 A., 192; 85 Me., 348.)

*When corporate officer personally liable.*

- 52 (N. Y. Sup.). Where a note, with the name of a corporation in the margin, signed by two persons, designated as "president" and "treasurer," respectively, is discounted for the payee without inquiry as to whether it was the note of the corporation or of the individual makers, the holder may treat it as a personal obligation of the makers. (First National Bank v. Stuetzer, 30 N. Y. S., 83.)

*Liability of survivors when one joint maker dies.*

- 53 (Ill. Sup., 1894). Where there are three or more joint makers of a note, and one of them dies while the note is unpaid and before suit brought, the surviving makers are jointly liable on the note. (Stevens v. Catlin, 37 N. E., 1023; 152 Ill., 56.)

*Defenses.*

- 54 (U. S. C. C. A., 1899). The maker of a promissory note given in payment for stock in a national bank, and immediately transferred by indorsement to said bank by the payee, can not resist payment of the note, in the hands of a receiver of the bank, on a plea of failure of consideration, because of the insolvency of the bank where the payee has fully indemnified him against loss. (Myers v. Hettinger, 94 Fed. Rep., 370.)
- 55 (Ky., 1901). In an action on a promissory note the pleas of non est factum and want of consideration are not inconsistent, and may be joined. (First Nat. Bank of Paducah v. Wisdom's Exrs., 63 S. W. Rep., 461; 3 Banking Cases, 483.)
- 56 (Ky., 1901). Under a plea of non est factum to an action by a bank on a promissory note which was placed in the bank by its president, who soon thereafter absconded, being a confessed forger and defaulter, it was admissible for defendants, the executors of the person whose name was signed to the note, to prove that the president, after the note sued on was discounted, had in his possession other notes purporting to have been signed by testator, and which were manifestly forgeries, as the transactions were logically connected, and when considered together authorize the conclusion that all the notes were prepared by the president to conceal his delinquency, with the intention to use them as it became necessary; and, besides, the fact that he forged testator's name to other notes would be admissible, at least, to show his capacity to imitate the signature. (Ib.)
- 57 (Ky., 1901). The court properly instructed the jury that, though the testator signed and delivered the note to the bank, yet if he did not receive from it, by himself or order, or for his use, the proceeds of the note, they should find for defendants, as plaintiff, having pleaded a particular consideration for the note, was bound to prove that consideration. (Ib.)

*Notes—Obligation of surety—Release.*

- 58 (U. S. C. C., 1904). Plaintiff, who was surety for her father on certain notes payable to defendant bank, agreed to become surety on four new notes, and to pay \$200 in money in consideration of her discharge

## NEGOTIABLE PAPER—Continued.

## GENERALLY—continued.

from further liability. A note on which plaintiff was liable, not then due, was not noticed when this arrangement was made, and on its maturity the bank commenced suit thereon against plaintiff; but plaintiff claimed that the bringing of suit on such note was a fraud, and released her from liability on the other notes. The bank thereupon surrendered the note and gave up all claim to recover thereon. *Held*, that the surrender of such notes cured the act of the bank in attempting to collect it in so far as it tended to show a violation of the previous agreement. (*Sowles v. First National Bank of Plattsburg et al.*, 130 Fed. Rep., 1009.)

## PROTEST OF NOTE.

*Notice of protest.*

- 1 (U. S. C. C. A., 1895). It is not essential that a notice of dishonor or of protest of a note should state in so many words that the holder looks to the indorser for payment, but a notice from which that fact may be reasonably inferred is sufficient. A copy of the note and of the protest sent to the indorser constitute such notice. (*Nelson v. First National Bank of Killingly*, 69 Fed. Rep., 798.)

*Notes—Liability of indorser.*

- 2 (U. S. Dist. Ct., 1902). A note payable to the order of the maker, when indorsed by him, becomes a negotiable instrument; and a second indorser for accommodation becomes a party to such instrument, with the liabilities and immunities of an indorser of commercial paper, and his liability can only be fixed by protest and notice in due form. (*In re Edson* (Vt.), 119 Fed. Rep., 487.)

*Waiver of demand, protest and notice by indorser.*

- 3 (U. S. Sup. Ct., 1892). A promissory note payable to the order of the maker, being indorsed by him, was indorsed and delivered to another for his accommodation. The latter indorsed it and borrowed money upon it, waiving demand and protest. The waiver was stamped upon the back of the note by mistake over both indorsements. *Held*, that the liability of the maker was not affected thereby. (*Gordon v. Third National Bank of Chattanooga*, 144 U. S., 97.)
- 4 (Tex., 1894). A promise by an indorser to pay a note after maturity, with knowledge that no demand was made and no notice given, waives such demand and notice. (*First National Bank of Hastings v. Bonner*, Tex. Civ. App., 27 S. W., 698.)
- 5 (Tex., 1894). A letter to the holders of a note, written after maturity of the note by the indorsers, wherein they promise to "do our utmost to put you in funds at an early date," and express a hope to be "able to take up this paper," and declare a willingness to confess judgment when sued, is sufficient evidence of waiver of demand and notice. (*Ib.*)
- 6 (Tex., 1894). An indorser may waive the benefit of a statute requiring suit to be brought at the first term of court after the cause of action accrues. (*Ib.*)

*Liability for failure to protest note.*

- 7 (Me.). A second indorser of a note having learned that the maker had failed, and that the first indorser, who lived in the same place as the maker, had agreed to meet it, wrote to his indorsee to recall it. Said indorsee had forwarded it through the usual bank channels for collection, and the indorser merely wished to save the protest charges. The indorsee consented to recall the note on condition that the new note should be signed by all the local indorsers. Three days before maturity the second indorser received a request from the first indorser to have the note forwarded for protest. Under directions from the second indorser the indorsee tried by telegraph to order the note forwarded, not knowing where it was, but on the day of

## NEGOTIABLE PAPER—Continued.

## PROTEST OF NOTE—continued.

maturity it came back to his residence too late for protest. *Held*, that the second indorser was estopped as against said indorsee to insist that his waiver of demand and notice should have been in writing. (*Hallowell National Bank v. Marston*, 27 A., 529; 85 Me., 488.)

- 8 (Minn., 1895). A complaint in an action on a note alleged that the payee delivered the note for collection at a bank, which sent it to plaintiff, who caused the same to be protested; that the payee claimed the protest to be invalid, and insisted that the bank pay the note, and that the bank, believing itself liable, required plaintiff to pay the same; and that on such payment the bank, as agent for the payee, delivered the note to plaintiff, and prayed that plaintiff be subrogated to the rights of the payee. *Held*, that the absence of an averment that the bank was authorized to deliver the note to plaintiff on payment, or that the payee received the money paid, or ratified the transaction, rendered the complaint insufficient on demurrer. (*Marine National Bank v. Humphreys*, 64 N. W., 148; 62 Minn., 141.)

## BONA FIDE HOLDERS FOR VALUE WITHOUT NOTICE.

*Who are bona fide holders.*

- 1 (U. S. Sup. Ct., 1892). Where the holder of bonds payable to bearer transfers them to stock brokers, to hold as margins on his individual stock transactions, and the brokers pledge them to a bank in the regular course of business as security for current indebtedness, the bank acquires a valid title to them, and the owner can not recover them except by paying the amount for which they are pledged. (*Thompson v. St. Nicholas National Bank*, 146 U. S., 240, affirming; 113 N. Y., 325; 3 N. B. C., 663.)
- 2 (U. S. C. C. A., 1896). In order to deprive one of the character of a bona fide purchaser it is not enough that he neglected to make the inquiry which a prudent man would or ought to have made, but he must have acted in bad faith. (*Atlas Nat. Bank v. Holm et al.*, 71 Fed. Rep., 489.)
- 3 (U. S. C. C. A., 1896). There is no presumption that a purchaser of a note was aware of existing defenses thereto. (Ib.)
- 4 (U. S. C. C. A., 1896). One who was president both of the A. bank and the B. bank received from the president of a third bank two notes, which the latter claimed to own individually, as collateral both for balances due from his bank to the A. bank and for debts due by him individually to the B. bank. The notes were kept by the A. bank until dishonored, and until its own balances were discharged, and were then sent to the B. bank. *Held*, that the fact that the B. bank received physical possession of the notes after dishonor was no evidence that it was not a bona fide holder for value. (*Kaiser et al. v. First Nat. Bank of Brandon*, 78 Fed. Rep., 281.)
- 5 (N. Y. Sup.). Defendant corporation placed bonds issued by it in the hands of one G. as its agent to sell to a third person, but instead of selling them G. pledged the bonds to plaintiff as collateral security for a debt owing by him. The bonds were negotiable in form, and plaintiff had no notice of the arrangement between defendant and G. *Held*, that plaintiff was a bona fide holder. (*Tompkins County National Bank v. Bunnell & Eno Inv. Co.*, 40 N. Y. S., 411.)
- 6 (Tenn., 1898). The mere fact that the holder of a promissory note knew that it was given for land and that there was a lien on the land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration for the note by an enforcement of the lien, will not render such holder subject to all the equities that may thereafter arise between the original parties to the notes, nor prevent him from being a bona fide purchaser. (*Merchants and Planters' Bank v. Penland*, 1 Banking Cases, 25; 101 Tenn., 445.)

## NEGOTIABLE PAPER—Continued.

## BONA FIDE HOLDERS FOR VALUE WITHOUT NOTICE—continued.

- 7 (Tex. Civ. App., 1896). The doctrine of *lis pendens* does not apply to a purchaser of negotiable bonds for value before maturity. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.*, Tex. Civ. App., 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchants' National Bank*, ib.)
- 8 (Vt. Sup., 1894). Defendant indorsed a note of his debtor to be discounted and part of the proceeds applied to his debt. The debtor pledged it with plaintiff as collateral security for another note of his in consideration of the latter's extension. Plaintiff had no notice of the agreement as to the application of the proceeds. *Held*, that plaintiff was a bona fide holder for value to the extent of the note secured, and could maintain action thereon. (*People's Nat. Bank v. Clayton*, 29 At. Rep., 1020; 66 Vt., 541.)

*When purchaser charged with notice.*

- 9 (U. S. Sup. Ct., 1899). By the rule that an individual negotiating for the purchase of a note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself, it is not meant that circumstances may not explain the note or may not relieve the taker from the obligation of inquiry. (*Auten v. United States Nat. Bank of New York*, 1 Banking Cases, 416; 174 U. S., 125.)
- 10 (U. S. C. C. A., 1896). The fact that a purchaser, for a valuable consideration, of negotiable notes from a member of the payee firm, who claims to be the owner thereof, knows that the latter is the president of a bank whose indorsement in blank appears on the notes, after the indorsement of the firm, is not sufficient to put the purchaser on inquiry or charge him with notice that the notes belong to the bank. (*Kaiser et al. v. First National Bank of Brandon*, 78 Fed. Rep., 281.)
- 11 (U. S. C. C., 1884). An indorsement upon negotiable paper, "For collection; pay to the order of A. B.," is notice to all purchasers that the indorser is entitled to the proceeds. (*Bank of the Metropolis v. First National Bank of Jersey City*, 19 Fed. Rep., 301.)
- 12 (Minn., 1884). The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner. (*Merchants' Nat. Bank of St. Paul v. Hanson*, 33 Minn., 40; 53 Am. Rep., 5; 3 N. B. C., 509.)
- 13 (Nebr. Sup., 1894). A certificate of deposit with provision that "This deposit not subject to check; with interest at 6 per cent if left six months; no interest after six months," is overdue, so as to charge purchaser with notice of equities, after six months. (*Kirkwood v. First National Bank of Hastings*, 58 N. W., 1016; 40 Nebr., 484; *Kirkwood v. Exchange National Bank*, ib., 1135; 40 Nebr., 497.)
- 14 (N. Y. Com. Pl.). It is an equitable defense to an action against the maker of a promissory note that the indorsee took it with notice that it was given to his immediate indorser by the maker as a security. (*Western National Bank v. Wood*, 20 N. Y. S., 642.)
- 15 (N. Y. Sup.). When a note is presented for discount by the first indorser, the presumption is that it had its inception in his hands, and the bank is not chargeable with notice that the note was owned by the maker, and that the indorsements were, therefore, for his accommodation. (*First National Bank v. Weston*, 34 N. Y. S., 558.)

*Indorsee of note presumed to take without notice.*

- 16 (U. S. C. C., 1882). An indorsee for value of a promissory note is presumed, in the absence of evidence to the contrary, to have taken it without notice of equities subsisting between the maker and payee. (*Third Nat. Bank v. Harrison et al.*, 10 Fed. Rep., 243.)

## NEGOTIABLE PAPER—Continued.

## BONA FIDE HOLDERS FOR VALUE WITHOUT NOTICE—continued.

*Who not purchasers for value.*

- 17 (Mich., 1896). A mere credit given by a bank to its depositor for a note procured by fraud does not constitute a purchase for value, in the absence of evidence that the credit was ever drawn upon, or that the account of which it became a part was exhausted before maturity of the note, or before notice of the fraud. (*Drovers' National Bank v. Blue*, 67 N. W., 1105; 110 Mich., 31.)
- 18 (Mich., 1896). Where plaintiff, in an action on a note, undertook, but failed, to establish that it purchased the note before maturity in good faith, proof of fraud by the payee in procuring the note is a complete defense unless plaintiff shows a bona fide purchase. (Ib.)

*When bank not a bona fide holder for value.*

- 19 (N. Y.). The mere discounting of paper, and placing the amount thereof to the credit of a depositor who already has a large balance to his credit, does not make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation, between the bank and the depositor, of debtor and creditor; and as long as that relation remains and the deposit is not drawn out the bank has simply promised to pay the depositor, has parted with no value, and is not entitled to the protection of a bona fide holder of paper. (*Nat. Bank of Newburgh, respondent, v. Daniel Smith, appellant*, 66 N. Y., 271.)

*When set-off by maker not allowed against purchaser.*

- 20 (N. C. Sup., 1895). A purchaser of several notes for value and before maturity, without notice of any set-offs, who pays one-half of their aggregate face value and gives the indorsee credit for the balance, subject to his check, holds all the notes free from any right of set-off in favor of the maker, and the fact that he may have recovered on part of the notes does not deprive him of the character of a purchaser for value, so as to let in the right of set-off as to the others. (*United States National Bank v. McNair*, 21 S. E., 389.)
- 21 (N. C. Sup., 1895). That an indorsee who rediscounts notes may have paid less than their face value for them does not entitle the maker to any right of set-off to which he would not otherwise be entitled. (Ib.)

*When holder must prove his purchase bona fide.*

- 22 (Minn. Sup., 1895). Proof of fraud in the inception of a note casts on the indorsee the burden of showing that he took it for value before maturity without notice; but proof that he paid full value before maturity raises a presumption that he purchased it in good faith without notice. (*Marine Nat. Bank v. Humphreys*, 64 N. W. Rep., 148; 62 Minn., 141.)
- 23 (N. Y. Sup.). The holder of a note does not have the burden of proving that he is a bona fide purchaser, unless it appears that the payee obtained it by fraud. (*Flour City National Bank v. Grover*, 34 N. Y. S., 496.)
- 24 (R. I., 1892). Until it is shown that the note in suit was never delivered by the maker, or that it was obtained from him by undue means, it is not incumbent on plaintiff to show himself a bona fide holder for a valuable consideration. (*Third National Bank v. Angell*, 29 A., 500; 18 R. I., 1.)

*Rights of innocent holder of note fraudulently obtained.*

- 25 (N. J., 1896). Negotiable paper fraudulent at its inception is not invalidated in the hands of one taking it for value before maturity, unless there be actual fraud upon his part. (*Second National Bank of Reading v. Hewitt*, N. J., 34 A., 988; 59 N. J. L., 57.)

## NEGOTIABLE PAPER—Continued.

## PAYMENT.

*When note given in payment of stranger's note may be enforced.*

- 1 (U. S. C. C., 1895). Where a person at the solicitation of national-bank officers gave his note to the bank to take up the note of a stranger, for the purpose, as stated by the officers, of getting the old note "out of the past-due notes," *held*, that the maker of the new note was liable to the receiver of the bank on a renewal of the note, whether the transaction was a real one or a mere trick to make it appear to the Government and the creditors and stockholders that the bank had a valuable asset, which it in fact did not have. (*Pauly v. O'Brien*, 69 Fed. Rep., 460.)

*Payment to indorser as agent of indorsee.*

- 2 (U. S. C. C., 1887). If the indorsee constitute the indorser or original holder, his agent, by relying on him to collect of the maker, taking himself no steps for that purpose until after the failure of the indorser, payment to the original holder will be good. (*Exchange National Bank v. Johnson et al.*, 30 Fed. Rep., 588.)
- 3 (U. S. C. C., 1887). If the maker pay other than the rightful owner of the note, he can not rely on facts unknown to him, and not influencing his action, as an estoppel, but if the facts be of a character that establish an agency for collection, that is a defense against repayment. (*Ib.*)
- 4 (Ark., 1899). Where a note is sent to bank, which is an indorser thereof, for collection, it can not plead in its own defense its failure to make demand and protest. (*Auten v. Manistee Nat. Bank*, 2 Banking Case, 215; 67 Ark., 243.)

*When indorser pays indorsee with new note.*

- 5 (U. S. C. C., 1887). If a bank accepts the note of the indorser in discharge of his liability as indorser, the title to the first note reverts to the indorser, and payment to him is good, although the indorser leave the note on deposit with the bank; but it is a question for the jury to determine whether, on the facts of the case, the new note be taken in discharge of the indorser's liability, or as a mere memorandum note, not intended to affect the title to the old note. (*Exchange Nat. Bank v. Johnson et al.*, 30 Fed. Rep., 588.)

*Payments by principal do not revive as to surety.*

- 6 (Ind., 1895). After a note is barred by statute of limitations, the liability of a surety thereon can not be revived by payments made, without his knowledge or consent, by the maker. (*Dougherty v. Hoffstetter*, 40 N. E., 278; 12 Ind., 699.)

*When payment to bank not payment on note.*

- 7 (Nebr., 1895). Payment of money on a note at a bank where it is payable is not a payment of the note if the note is not at the bank and is not produced. (*First National Bank of Omaha v. Chilson*, 63 N. W., 362; 45 Nebr., 257.)

*Evidence of payment.*

- 8 (N. C., 1899). The execution of the note sued on was admitted by defendants, and their plea was substantially that of payment, but it was not contended that the note had ever been actually paid, or that it had been canceled or surrendered, and it was permitted to remain in the possession of the plaintiff bank, and, upon its failure, was turned over among its assets to the receiver. The evidence tended to prove simply an executory agreement to pay. *Held*, that a verdict should have been directed for plaintiff. (*Piedmont Bank of Morgantown et al. v. Wilson et al.*, 124 N. C., 561.)
- 9 (N. C., 1899). A bank cashier can not, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note already held by another bank as collateral security, as such a transaction is not within the ordinary dealings of a bank. (*Ib.*)

## NEGOTIABLE PAPER—Continued.

## PAYMENT—continued.

*Reissuance of note by principal after payment.*

- 10 (Wash., 1893). A note coming into the hands of the maker after payment can not be reissued by him, so as to bind a surety thereon, in the hands of one taking it with knowledge of the suretyship. (First National Bank of Seattle *v.* Harris, 34 P., 466; 7 Wash., 139.)

## FRAUD.

*Fraud in procuring stock subscription.*

- 1 (Ala., 1896). A plea in an action on a note alleging that it was a renewal of one originally executed in payment of a subscription to stock; that three certain persons were interested in selling said stock; that one of said persons, acting for himself and his associates, induced defendant to sign said note by representing that certain other persons had agreed to take a large amount of said stock, that others had contracted to take a large quantity of the product of the corporation, and that the property of the corporation was then marketable, but that said representations were wholly false, imports liability on said three persons for said false representations, and the averments thereof are sufficient to avoid the original note and all mere renewals thereof, as between defendant and said persons and their assigns with notice. (Alabama National Bank *v.* Halsey, Ala., 19 So., 522; 109 Ala., 196.)
- 2 (S. Dak., 1894). Where a bank takes a note for shares of its stock sold by its president, with knowledge of president's representations as to stock's value, the maker, in an action on the note, may set up the defense that the representations were false. (National Bank of Dakota *v.* Taylor, 58 N. W., 297; 5 S. Dak., 99.)

*Fraud in procuring assignment.*

- 3 (Idaho, 1895). Where, on an issue whether a transferee of notes in fraud of the owner's creditors acquired the notes in good faith in due course of business, it appeared that he was an intimate friend of the owner and well acquainted with the latter's business affairs; that he knew that the payee did not own the notes and that the use of his name was a mere pretense; that as fast as payments were made on the notes he remitted them to the owner, and that a receipt therefor given him by the owner was signed in the owner's name "for" the payee, a finding that he had no knowledge of the fraud was against the evidence. (First National Bank of Hailey *v.* Van Ness, 43 P., 59; 4 Idaho, 539.)

*Ratification of fraud.*

- 4 (Minn., 1896). The mere promise to pay, or the procuring of an extension of the time for paying, a note obtained by fraud, to pay which the maker is under no legal or moral obligation, does not, as a matter of law, constitute a ratification of the note, in the absence of facts creating an estoppel in pais. (First National Bank of Decorah *v.* Holan, 65 N. W., 952; 63 Minn., 525.)

*Agreement to forbear suit for fraud.*

- 5 (Oreg., 1892). Where a signer of a joint and several note assigned his property to another, and the payee thereupon called on such assignee, and, to induce him to sign, said, "Unless you sign the note we will contest the conveyance," whereupon the assignee signed, it was sufficient to warrant a jury in finding an implied agreement to forbear. (First National Bank of Arlington *v.* Cecil, Oreg., 31 P., 61; 23 Oreg., 58.)
- 6 (Oreg., 1892). Where a signer of a joint and several note assigned his property to another, and the assignee thereupon assigned the note, the payee agreeing to forbear, the assignee became a party to a new contract, on a new and additional consideration; the rule being that, when one signs his name to a joint and several note for a valuable consideration, after delivery he becomes as between himself and the payee, a maker, and may be sued as such. (Ib.)



## NOTARY PUBLIC.

- 1 (U. S. C. C. A., 1895). Since the removal of the disqualification of interested witnesses, a notary who is an officer of a bank may legally protest paper belonging to it. (*Nelson v. First National Bank of Killingly*, 69 Fed. Rep., 798.)
- 2 (Nebr. Sup., 1902). Instruction sent with a note forwarded by one bank to another for the purpose of collection, "to protest," held to mean, and to have been understood to mean, by the notary to whose attention it was called that the necessary steps to bind indorsers were to be taken. (*Dartmouth Sav. Bank v. Foley et al.*, 89 N. W. Rep., 395; 4 Banking Cases, 402.)
- 3 (Nebr. Sup., 1902). While a prompt return to the sender of a protest, showing no notice to an indorser, would have enabled it to serve notice in time, having intrusted that duty to a notary, it was not bound to make examination to see whether it was done. (*Ib.*)
- 4 (Nebr. Sup., 1902). Giving notice of dishonor of protested paper is, in the absence of contrary instructions, an official duty of a notary public in Nebraska, for neglect of which an action is maintainable by the party injured upon his official bond. (*Ib.*)

## NOTICE.

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## NOTICE TO PRESIDENT OF BANK.

- 1 (U. S. C. C. A., 1896). The receiver of the C. National Bank brought an action against one W. on certain promissory notes, made by him directly to the bank. W. defended the action on the ground that the notes were given for the purchase money of an interest in a brickyard, which W. had been induced to purchase by the misrepresentations of C., the president of the bank. It appeared that the bank held sundry notes of the principal owner of the brickyard, which notes were worthless; that the notes made by W. were substituted for these, and that C. pretended to be interested himself in the brickyard, and to enter into a partnership with W. and the former owner of the yard for the purpose of inducing W. to make the notes to the bank, which would replace the worthless notes it then held. There was also evidence tending to show that C. was the active party in the transaction and misrepresented the facts to W. Held, that the bank, being the payee of the notes, could not be held to have been without notice of the fraud, or unaffected by C.'s knowledge thereof, and that it was error to direct the jury to render a verdict against W. (*Wilson v. Pauly*, 72 Fed. Rep., 129.)
- 2 (U. S. C. C., 1894). Defendant executed his promissory note to C. and delivered it upon condition that it was to be surrendered to him upon C.'s failure to perform stipulated acts. C. immediately transferred this note by indorsement to a bank of which he was president and general manager. Held, that, as C. himself was the sole representative of the bank in the transfer of the note to it, the bank is chargeable with his knowledge of the condition to which it was subject, and and so can not sue on the note until that condition is performed. (*First National Bank of Blaine v. Blake*, 60 Fed. Rep., 78.)

## NOTICE—Continued.

## NOTICE TO PRESIDENT OF BANK—continued.

- 3 (U. S. C. C. A., 1899). Knowledge by the president of a bank of his misappropriation of bank funds *held* not notice to the bank. (*Lamson v. Beard*, 94 Fed. Rep., 30; *C. B. Congdon & Co. v. Same*, *ib.*; *Phelps v. Same*, *ib.*; 1 Banking Cases, 568.)
- 4 (U. S. C. C. A., 1896). A bank whose president acted for it in making a loan on guaranteed negotiable bonds, after he had learned that the stockholders of the company making the guaranty had repudiated it as unauthorized, will be charged with notice. (*Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. Rep., 433.)
- 5 (U. S. C. C. A., 1896). The president of a bank, having embezzled funds of the bank on deposit with its reserve agent, replaced such funds with money borrowed by him on the bank's note without the directors' knowledge, and such borrowed money was thereafter drawn out to pay the bank's lawful debts. *Held*, that the bank, having received the benefit of the loan through its president, it was affected with his knowledge of the loan, and hence was liable to the lender as for money had and received to its use. (*Ditty v. Dominion Nat. Bank of Bristol, Va.*, 75 Fed. Rep., 769.)
- 6 (U. S. C. C. A., 1897). Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, *held* to be imputable to the bank, where the other member of the firm was its president, and as such acted as the sole representative of the bank in accepting the certificate. (74 Fed., 1000, affirmed; *Niblack v. Cosler*, 80 Fed. Rep., 596.)
- 7 (Colo. Sup., 1896). Where the president of a bank had been often told of a third ownership in property afterwards levied on by the bank, the bank was charged with that information, though the president gained it in his private business. (*Campbell v. First Nat. Bank of Denver*, 43 P., 1007; 22 Colo., 177.)
- 8 (Ga.) The knowledge of a president of a bank that certain stock had not been fully paid up is chargeable to the bank, if he, acting for it and in its behalf, accepted a transfer of the stock to it, and it thereunder retained the same. (*Fouche v. Merchants' Nat. Bank*, 36 S. E., 256; 110 Ga., 827; *Merchants' Nat. Bank v. Fouche*, *id.*)
- 9 (Ill. App.). Where the president of a bank received notice while engaged in business for the bank the bank was chargeable therewith. (*Bartlett v. Woodbine Sav. Bank*, 57 Ill. App., 425.)
- 10 (Ill. Appls., 1884). The private knowledge of the president of a bank of the failure of the consideration of a note purchased by it is not attributable to the bank. (*First Nat. Bank of Greenville v. Sherburne*, 3 N. B. C., 382; 14 Bradw., 566.)
- 11 (Ky. Appls., 1902). While it is the duty of a trust company acting as administrator to deposit the funds of the estate in bank, it was guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge, at the time of the insolvent condition of the bank, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which, if made, would have revealed to them the true condition of the bank. (*Germania Safety Vault and Trust Co. v. Driskell et al.*, 66 N. W. Rep., 610; 4 Banking Cases, 538.)
- 12 (Ky. Appls., 1902). The trust company can not rely upon the general reputation of the bank, where its president was also president of the bank, and thus had the means at hand, coupled with the duty, to acquaint himself with its condition. (*Ib.*)
- 13 (Md. Appls., 1900). The law imputes to one who is president and director of a bank knowledge of its condition; and neither he nor its other officers can be given, in such an action, on account of their willful

## NOTICE—Continued.

## NOTICE TO PRESIDENT OF BANK—continued.

ignorance, a better standing than if he or they had actual knowledge of such condition. (*James Clark Co. et al. v. Colton et al.*, 2 Banking Cases, 530; 91 Md., 195.)

- 14 (Tenn. Sup., 1896). A bank will not be charged with notice of the insanity of an accommodation indorser on a renewal note accepted by it because at that time the president of the bank, who was a member of the discount committee which passed on the note, had knowledge of such insanity, he not having been present with the committee when the new note was taken and the old note extinguished, and not having had knowledge of the transaction till the day after it was consummated. (*Memphis Nat. Bank v. Sneed*, 36 S. W. 716; 97 Tenn., 120.)
- 15 (Tenn. Ch. App., 1895). When an agent of an undisclosed principal holding bonds as collateral, with notice that subject to such pledge they have been transferred as collateral to another, relinquishes them to the pledger, who, from proceeds obtained from a sale thereof, pays a debt to a bank of which such agent is president, having been urged by such president to make a payment, the bank will be liable for the money so received to the one having the secondary rights in the bonds as security, the president, and through him the bank, being charged with notice how the money was obtained. (*Hughes v. Settle*, Tenn. Ch. App., 36 S. W., 577.)
- 16 (Tenn. Ch. App., 1901). Notice acquired by the president in a private transaction is not imputable to the bank. (*Smith v. Carmack*, 64 S. W. Rep., 372.)
- 17 (Wash., 1893). The fact that the maker of a note told the president of a bank, at the office of a company of which they were both directors, that a certain note had been obtained from him by fraud will not be held notice to the bank, where it afterwards discounts the note. (*Washington National Bank v. Pierce*, 33 P., 972; 6 Wash., 491.)

## NOTICE TO CASHIER OF BANK.

- 1 (U. S. C. C. A., 1901). Where a borrower from a bank presented collaterals to the assistant cashier, who was authorized to represent the bank in the transaction, and was directed by the latter, in accordance with custom, to take such collaterals to the note teller, who had charge of the collaterals to be checked up, notice to the teller in regard to the rights of a third person in one of the securities pledged was notice to the bank. (*Zeis v. Potter et al.*, 105 Fed. Rep., 671.)
- 2 (U. S. C. C. A., 1902). The rule that knowledge possessed by an agent while transacting business for his principal is imputable to the principal is based on the presumption that he will communicate such knowledge as his duty requires, and is subject to exception where in the transaction he acts not only for his principal, but also for himself individually, and his interest or conduct is such as to render it certain that he would not make such disclosure. (*Bank of Overton v. Thompson*, 118 Fed. Rep., 798.)
- 3 (U. S. C. C. A., 1902). The cashier of a bank sold cattle in which he and complainant were jointly interested, receiving payment in a draft and credit slip payable to the bank. These he deposited to his own credit, and collected and thereafter checked out the entire amount and converted it to his own use. He transacted the entire business on behalf of both the bank and himself, and no one else connected with the bank had any knowledge of complainant's interest in the cattle or their proceeds. *Held*, that the bank was not chargeable with notice that complainant had any interest in the fund deposited, and occupied no trust relation to him which rendered it accountable for such interest. (*Ib.*)
- 4 (U. S. C. C. A., 1902). A contract between an owner of land and his tenant by which the former agreed to furnish money for the purchase of stock to be placed on the land and cared for by the tenant,

## NOTICE—Continued.

## NOTICE TO CASHIER OF BANK—continued.

the amount to be repaid with interest from the proceeds of the stock when sold, and the profit or loss to be divided equally, created a partnership in the venture; and on a sale of the stock by the tenant at a price which realized a profit, the landlord had no interest in the specific money received therefor and no claim against a bank in which it was deposited by the tenant to his own credit on account of such deposit, even though the bank had knowledge or notice of the source from which it was obtained, his only right being to hold his partner to a personal accounting. (Ib.)

- 5 (U. S. C. C., 1887). Defendant was heavily indebted to the bank of which he was cashier, and within four months of the filing of a petition by a creditor to have him declared an insolvent (under Rev. Laws Vt., sec. 1870) transferred certain securities to the bank with a view to preferring it over his other creditors. *Held*, that knowledge on the part of defendant of his insolvency affected the bank of which he was cashier with such knowledge and made the transfer of such securities void, under Revised Laws Vermont, section 1860, which provides that a conveyance made by an insolvent, or one in contemplation of insolvency, within four months before the filing of a petition of insolvency by or against him, with a view to giving a preference to certain of his creditors, the latter having knowledge of his insolvency, is void. (*Witters v. Sowles's assignees et al.*, 32 Fed. Rep., 762.)
- 6 (Cal.). The articles of incorporation of a bank provided that "it is to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." The cashier of such bank made a loan for a customer who had money deposited therein, took the acknowledgment to the mortgage securing the loan, had possession of the unrecorded mortgage, and received two installments of interest, which he placed to such customer's credit on his pass book. *Held*, that the knowledge of its cashier was the knowledge of the bank, affecting it with notice of such unrecorded mortgage. (*Christie v. Sherwood*, Cal., 45 P., 820; 113 Cal., 526.)
- 7 (Conn.). A bank cashier's fraud in obtaining the execution of a note can not be imputed to the bank merely from the fact that he was its cashier, on the cashier's transferring the note to the bank as security for a loan so as to preclude the bank from recovering on the notes as indorsee. (*First Nat. Bank v. Bevin*, 45 A., 954; 72 Conn., 666.)
- 8 (Ga. Sup., 1898). Knowledge by one of the officers of a bank, who joined in the acceptance for the bank of a negotiable note before due, of a fact which would put a prudent person upon inquiry as to the power of the maker to execute the paper, is sufficient to charge the bank with notice of a disability, if such existed. (*Hager v. National German-American Bank*, 31 S. E., 141.)
- 9 (Ky. Appls., 1899). Notice to a cashier of an incorporated bank that a note discounted with the bank was procured by fraud is notice to the bank, so that the defense is available against it. (*Citizens' Sav. Bank v. Walden*, 52 S. W., 953; *Same v. Lydane*, id.)
- 10 (Mich. Sup., 1898). Where a bank had no committee or agent to make loans excepting their cashier, evidence that he did not know that a note indorsed to them for value was procured by fraud is *prima facie* sufficient to show want of such notice by bank. (*Drovers' Nat. Bank v. Potvin*, 74 N. W. Rep., 724.)
- 11 (Minn. Sup., 1898). Knowledge of a cashier and two directors that the cashier has without authority pledged the bank's responsibility upon the note of a corporation in which such officers have an interest adversely to the bank is not notice to the bank. (*Fort Dearborn Nat. Bank v. Seymour*, 73 N. W., 724; 71 Minn., 81.)
- 12 (Mo. Appls.). Knowledge of the cashier of a bank, procured by reason of his interest and connection with other parties, but not obtained in the performance of any duty he owed to the bank, is not notice to the bank. (*National Bank of Commerce v. Fitze*, 76 Mo. App., 356.)

## NOTICE—Continued.

## NOTICE TO CASHIER OF BANK—continued.

- 13 (Mo. Sup., 1894). The cashier of a bank was also the secretary of another corporation, and while working in the interest of the latter sold stock therein, taking the purchaser's note therefor, which note was afterwards discounted by the bank. *Held*, that the bank was not affected with its cashier's knowledge as to the value of the stock sold, obtained through his connection with the other corporation. (*Benton v. German-American National Bank*, 26 S. W., 975; 122 Mo., 332.)
- 14 (N. Y.). Where the cashier of a bank conspires with a third person to sell worthless property to defendant at par, in order that the proceeds may be applied to the payment of a debt due the bank, the bank is chargeable with the knowledge that the cashier had of such conspiracy. (*Merchants' National Bank v. Tracy*, 29 N. Y. S., 77.)
- 15 (N. Y.). In an action on a check there was evidence that defendant gave the check, postdated, to one G. for the price of stock of a corporation, under an agreement that G. should not use the check until defendant had further considered the purchase of the stock; that defendant was induced to give the check by representations of G. as to the prosperity of the company, which was in fact insolvent; that the cashier of plaintiff bank knew of the negotiations between defendant and G.; that G. immediately procured the check to be discounted by plaintiff and placed the proceeds to the credit of the company, which was largely indebted to plaintiff. *Held*, that a finding that plaintiff was not a bona fide holder for value was sustained by the evidence, though plaintiff's cashier denied that he knew of the negotiations between defendant and G. (*Ib.*)
- 16 (S. Dak.). Where a partner sells to a bank of which he is cashier a note due the firm, and the bank acts entirely through its discount committee, to which he does not belong, it is not affected with knowledge possessed by him of infirmities in the note. (*National Bank of Commerce of Pierre v. Feeney*, S. Dak., 70 N. W., 874; 9 S. Dak., 550.)
- 17 (Tenn. Sup., 1898). Where the cashier of a bank has been given full authority to make discounts, it can not be contended in behalf of the bank that notice to the cashier is not notice to the bank in the discounting of notes. (*Merchants and Planters' Bank v. Penland*, 1 B. C., 25; 101 Tenn., 445.)
- 18 (Tenn. Chancery Appls., 1897). A holder of bank stock placed it in the hands of the bank's cashier for negotiation. The cashier obtained a loan on the stock and was told by the owner to remit the proceeds to him. The owner was at the time indebted to the bank, and the cashier, without authority, deposited the proceeds in the bank, by which it was appropriated in payment of the indebtedness. *Held*, that the bank was charged with notice of the cashier's fraud and could not make the appropriation. (*Winslow v. Harriman Iron Co.*, 42 S. W., 698.)
- 19 (Tenn. Chancery Appls., 1897). G., cashier of a bank which had express notice that W. was manager of H. & Co., and was forbidden from selling or discounting drafts received in the course of business, having, as agent of L., bought a draft indorsed to W., manager, and then, as cashier, received the proceeds of the check given by L. and placed it to the individual credit of W., and the draft having afterwards been received by the bank for collection, and the proceeds when collected having been paid to L., the bank is liable to H. & Co. therefor. (*Heinz v. Fourth Nat. Bank*, 48 S. W., 133.)
- 20 (Tex. Civ. Appls., 1896). Notice to the cashier of a national bank is notice to the bank. (*First National Bank of Mason v. Ledbetter*, Tex. Civ. App., 34 S. W., 1042.)
- 21 (Vt. Sup., 1898). Knowledge acquired by the officers of a bank while not acting for it, but while acting for themselves, is not imputable to the bank. It appeared that an accommodation note was executed by B. to his brother, plaintiff's cashier, for use at the plaintiff bank; that it

## NOTICE—Continued.

## NOTICE TO CASHIER OF BANK—continued.

was appropriated to the use and benefit of plaintiff by such cashier, with the knowledge and consent of the maker, after the latter had become insolvent; but the plaintiff, at such time, was not chargeable with notice of such insolvency. *Held*, that the assignees of the maker could not take advantage of such insolvency to defeat such appropriation. (*First Nat. Bank of Brandon v. Brigg's assignees*, 1 B. C., 19; 70 Vt., 594.)

## NOTICE TO DIRECTOR OR MESSENGER.

*Notice to director of bank.*

- 1 (U. S. C. C., 1882). Where a bank, in the absence of a director by whom a note has been offered for discount, accepts it, and accepts a note payable to him and indorsed to it as collateral, its rights are not affected by such director's knowledge of illegality in the inception of the note accepted as security. (*Third National Bank v. Harrison et al.*, 10 Fed. Rep., 243.)
- 2 (U. S. C. C. A., 1893). Where grantor states to director of bank that he is willing to convey a half interest in certain land to the bank's president, with the understanding that such president was to deed the whole interest to the bank, and that the president or the bank was to pay him by giving him credit upon notes then running against him in the bank, *held*, not to amount to notice to the director that the grantor intends to retain a vendor's lien, but rather imports a notice that no such lien is to be retained. (*First National Bank of Sheffield et al. v. Tompkins*, 57 Fed. Rep., 20.)
- 3 (Ga.). Knowledge of failure of consideration of a negotiable note, which the director of a bank sells to it before the maturity of the paper, is not chargeable to the bank when in the transaction the seller did not act for it at all, but exclusively for himself, and the bank was represented by another of its officials, who alone acted for it. (*English-American Loan and Trust Co. v. Hiers*, 38 S. E., 103; 112 Ga., 823.)
- 4 (Md. Appls., 1903). Notice to a director of a banking corporation privately, or acquired by him generally through channels open to all persons, and which he does not communicate to his associates in the management of the corporation, is not binding on the same. (*Black v. First Nat. Bank of Westminster*, 5 B. C., 388; 54 Atl. Rep., 88.)
- 5 (Mass.). If a director of a bank, who acts for the bank in discounting a note, has knowledge that the note was procured by fraud, the bank is affected with his knowledge. (*National Security Bank v. Edward F. Cushman*, 121 Mass., 490.)
- 6 (N. J.). A bank discounting a note before its maturity is not chargeable with the knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity, such director not having acted with the board in making the discount. (*First National Bank of Hightstown v. Christopher*, 40 N. J. Law, 435.)
- 7 (N. J.). A director offering a note, of which he is the owner, to the bank of which he is a director, for discount, is regarded in the transaction as a stranger, and the bank is not chargeable with the knowledge of such director of an infirmity or defect in the consideration of the note. (*Ib.*)
- 8 (N. J.). P. was a member of the firm of M. & J. S. P., and also a director of the bank of H. He obtained at the bank the discount of a note belonging to the firm, which had been got of the maker by fraud. He had notice, as a member of the firm, of the fraud before the note was offered for discount, but did not communicate his knowledge to any of the officers of the bank. *Held*, that the knowledge of P. was not, constructively, notice to the bank. (*Ib.*)

## NOTICE—Continued.

## NOTICE TO DIRECTOR OR MESSENGER—continued.

- 9 (N. Y.). In a suit by a bank on a note, against accommodation indorsers, it appeared that one K., a director of the bank, drew the notes, and procured defendant's indorsement, and that he agreed with them that a certain other person should also indorse the note. One witness testified, without objection, that, so far as he knew, K. was the bank's counsel. Plaintiff gave no proof on the subject of K.'s agency. *Held*, that the evidence was sufficient to show that notice to K. was notice to the bank of the agreement to procure such additional indorser. 27 N. Y. S., 883 affirmed. (Twenty-sixth Ward Bank of Brooklyn v. Stearns, N. Y. App., 42 N. E., 1050; 148 N. Y., 515.)
- 10 (Pa.). When the director of a bank is informed of the equities existing between the maker and the payee of a note, such notice does not bind the bank acquiring the note for value before maturity, since notice to the director is not notice to the corporation. (Boston Commercial Bank v. Heppes, 23 Pa. Co. Ct. R., 447; 9 Pa. Dist. R., 352.)
- 11 (Wis., 1896). On an issue whether the plaintiff bank had knowledge of the preference of a creditor of its debtor, it was proper to instruct that the bank was not chargeable with knowledge of its directors acting individually, but that the jury might consider the knowledge of the directors as tending to prove knowledge on the part of the bank. (Continental Nat. Bank of Chicago v. McGeoch, Wis., 66 N. W., 606; 92 Wis., 286.)

*Notice to messenger.*

- 12 (Ga.). A bank was not affected by information given to one of its messengers by a member of a former partnership, to whom a draft upon which the partnership was liable, and which was subsequently renewed, was presented, to the effect that the partnership had been dissolved, and that the other partner was liable for its debts, where the information was not in fact communicated to the bank, and the messenger's agency was restricted to mere collections. (Camp v. Southern Banking and Trust Co., Ga., 25 S. E., 362; 97 Ga., 582.)

## WHEN THOSE DEALING WITH AGENT ARE PUT ON INQUIRY.

- 1 (U. S. Sup. Ct., 1884). An agent can not lawfully act for his principal and for himself in matters in which they have adverse interests, and every person dealing with an agent who is acting for himself as well as for his principal in such matters is put upon inquiry as to authority and good faith of the agent. (Moore v. Citizens' National Bank of Piqua, Ohio, 15 Fed. Rep., 141. Affirmed, 111 U. S., 156.)
- 2 (U. S. Sup. Ct., 1884). The plaintiff contracted to loan money to M., cashier of the defendant bank, for his individual uses, on his representations that he held a number of shares of stock of said bank, and his agreement to transfer a certain number thereof to the plaintiff as security for the loan. In pursuance of said agreement, M. afterwards produced a certificate of stock bearing the genuine signatures of the president and of himself as cashier, on the faith of which plaintiff loaned him the money. In fact, M. had previously hypothecated and transferred to others all the stock of said bank which he had held, and the certificate was fraudulently issued, without any transfer of stock and without any knowledge of any of the officers of the bank except himself, he having used for that purpose a certificate left with him for use as occasion might require, signed by the president in blank. The plaintiff had no knowledge of the fraud, and believed that the certificate had been issued in good faith and by competent authority, but knew that the transaction was for the benefit of M. *Held*, that the knowledge that M. was acting for himself as well as for the bank in issuing the certificate put the plaintiff upon inquiry as to the authority and good faith of M., and having failed to make it, the bank is not liable on the certificate. (Ib.)

## NOTICE—Continued.

## NOTICE IN TRANSACTIONS BETWEEN OFFICER AND BANK.

- 1 (U. S. C. C., 1894). The rule that where a bank officer is dealing with the bank on his own account his knowledge will not be imputed to the bank does not apply where such officer is the sole representative of the bank in the transaction. (*First National Bank of Blaine v. Blake*, 60 Fed. Rep., 78.)
- 2 (U. S. C. C. A., 1899). Possession of books by a bank containing entries of drafts fraudulently drawn by the president in personal brokerage transactions is not notice thereof to the bank, where the books were under the sole control of the president and kept in such a manner as to conceal his defalcations. (*Lamson et al. v. Beard*, 94 Fed. Rep., 30; 1 B. C., 568.)
- 3 (U. S. C. C. A., 1899). Knowledge by the president of a bank of his misappropriation of its funds in personal transactions is not notice to the bank. (*Ib.*)
- 4 (Ga.). Where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital stock of which they had, under the partnership articles, agreed to contribute a given sum, without the knowledge or consent of the other partner executed and delivered to the bank a note in the name of the partnership, in order to raise the money they had agreed to pay into the partnership business, the bank was affected with notice that the transaction was for the private benefit alone of the two parties raising the money, and hence could not hold the partnership itself nor the remaining partner liable on the note. (*Brobstron v. Penniman*, 25 S. E., 350; 97 Ga., 527.)
- 5 (Mass.). The president of plaintiff bank, without consideration, obtained defendant's note as a personal loan, and without disclosing the want of consideration procured its discount by plaintiff's cashier. *Held*, that though the cashier was without authority to discount paper, his agency in discounting the note not having been disavowed by plaintiff, it could recover on the note, as the president's knowledge of its infirmity could not be imputed to it. (*First National Bank of Grafton v. Babbidge et al.*, 36 N. E., 462; 160 Mass., 563.)
- 6 (Mo., 1893). Where an officer of a bank is dealing with it in his individual interest, the bank is not chargeable with his uncommunicated knowledge of facts derogatory to his title to the paper which is the subject of the transaction. (*Merchants' National Bank of Kansas City v. Lovitt*, 21 S. W., 825.)
- 7 (Mo., 1893). Where the president acts for the bank in accepting for discount paper offered by another officer, the bank is not affected by any knowledge of the latter regarding such paper, since he is acting in the transaction in his own behalf. (*Ib.*)
- 8 (Mo., 1893). The fact that the discount was calculated by the officer offering the paper would not be material in such case. (*Ib.*)
- 9 (Mo. App.). Where the president of a bank, as agent of a shareholder, fraudulently and without authority has such shareholder's certificates canceled and new certificates issued to himself as transferee, he is acting in a double capacity, and the bank is bound by his knowledge of the fraud and want of authority. (*Withers v. Lafayette County Bank*, 67 Mo. App., 115.)
- 10 (Wyo., 1895). Where the president of the bank knew that its cashier had purchased sheep from plaintiff, and was in debt therefor, that outside of them he could not pay the price, and that he had gone with the sheep to market, to sell them, the bank is chargeable with notice that a draft, sent to it by the cashier, was the proceeds of the sheep and of plaintiff's interest therein as mortgagee of the sheep, and was liable to plaintiff for a portion of the draft applied on its own debt. (*Rock Springs National Bank v. Luman*, 42 P., 874; 5 Wyo., 159.)



## NOTICE—Continued.

## MISCELLANEOUS.

*In transactions between banks.*

- 1 (U. S. C. C. A., 1894). The fact that notes offered for discount to a bank by another bank, its correspondent, are payable to its president individually and bear his indorsement, followed by that of the bank affixed by him, does not give notice to the discounting bank that they are the property of such president and the bank's indorsement is for accommodation, especially when the negotiations for the discount have been carried on by letters written in their official capacity by the president and cashier of the offering bank. (*United States National Bank v. First National Bank*, 64 Fed. Rep., 985.)

*When bank put on inquiry.*

- 2 (U. S. C. C., 1895). Where there is a custom between brokers and bankers that on application of a broker a bank will certify as to whether it has any lien on certain of its stock by the holder thereof being indebted to it, a bank, by being asked by a broker to give such a certificate, is thereby put on inquiry and charged with notice that a loan for a certain amount had been or was to be made to the holder of the stock by a certain person. (*Covington City National Bank v. Commercial Bank*, 65 Fed Rep., 547.)

*Bank charged with notice of letters mailed to it.*

- 3 (U. S. C. C. A., 1893). A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty it is to open and distribute mail matter, although he conceals such letters to hide certain irregularities in his office and thereby prevents their coming into the hands of the other bank officers. (*First National Bank of Evansville v. Fourth National Bank of Louisville*, 56 Fed. Rep., 967.)

*Service of notice by copy.*

- 4 (Ga., 1894). The fact that defendant, with his family, is absent from the county because of the prevalence of an epidemic does not prevent service of process on him by leaving a copy thereof at his residence during such absence. (*Burbage v. American National Bank*, 20 S. E., 246; 95 Ga., 503.)

*When pledgee of stock not charged with notice.*

- 5 (Ill.). The pledgee of stock can not be said to acquiesce in the payment of dividends thereon to the pledgor where he has no notice of it, actual or constructive. (*Fairbanks v. Merchants' National Bank*, 30 Ill. App., 28; reversed, 22 N. E., 524.)

*Notice to nonresident.*

- 6 (Iowa, 1896). Notice of expiration of time to redeem from sale of land for taxes, which the statute provides shall be served on the person in whose name the land is taxed if he is a resident of the county, and may be served on a nonresident of the county by publication, is properly addressed, in the case of a nonresident, to the "Am. Ex. Bank," that being the name as it appeared on the lists to whom the land was taxed. (*American Exchange National Bank of New York v. Crooks*, 66 N. W., 168; *Same v. Dugan*, Ib.; 97 Iowa, 244.)

*Purchaser of partnership property.*

- 7 (Nebr., 1896). One who knowingly receives partnership property with knowledge that its proceeds are passing to the individual use of one partner is charged with notice of such partner's want of authority to dispose of the property for his individual benefit. (*Columbia National Bank of Lincoln v. Rice*, 67 N. W., 165; 48 Nebr., 428.)

*Officer's act outside his authority.*

- 8 (Nebr. Sup., 1902). The acts of a bank officer, outside the usual scope of his authority, in a matter to which it is no party, and of which it is not chargeable with notice, do not bind the bank. (*Jones v. First Nat. Bank of Lincoln*, 4 Banking Cases, 566; 90 N. W. Rep., 512.)

## NOTICE—Continued.

## MISCELLANEOUS—continued.

*Change in officers does not affect notice once given.*

9 (Nebr. Sup., 1902). The rule is well settled that a bank or other corporation, being once charged with notice of the character of a transaction, continues to be affected by such notice, whatever changes may occur in the personnel of its working force. (United States Nat. Bank of Holdrege *v.* Forstedt, 4 Banking Cases, 521; 64 Nebr., 855.)

*To officer acting outside his duties.*

10 (N. C. Sup., 1896). The fact that the chairman of the defendant committee was the attorney for the creditor in a garnishment proceeding did not affect the liability of defendant under the notice received by him as agent of the defendant several months before. (Anniston National Bank *v.* School Committee of Town of Durham, N. C., 24 S. E., 792; 118 N. C., 383.)

*Notice to one partner notice to all.*

11 (Tex. Civ. App., 1898). In regard to partnership business, the knowledge of one partner is imputable to the other. (Gill *v.* First Nat. Bank, 1 B. C., 28.)

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GENERALLY.

*Employment of officers.*

- 1 (N. Y. Sup., 1873). A national bank can not hire one of its officers for a specified time. (*Harrington v. First National Bank of Chittenango*, N. B. C., 760; 1 *Thomp. & Cook*, 361.)
- 2 (N. Y. Sup., 1873). Knowledge, without objection, by the directors of a bank that one is acting in its employ does not ratify the details of a contract for his employment by the president unless they know of such details. (*Ib.*)

*Directors may remove officers at pleasure.*

- 3 (N. Y. Sup.). Directors of national banking associations may remove the president, both under the law of Congress and the articles of association, where the latter so provide. The power exists, though the association has adopted no by-laws. (*Taylor v. Hutton*, 43 *Barb.*, 195.)
- 4 (N. Y. Sup., 1873). The officers of a national banking association can hold their positions only by the tenure specified in section 5136, Revised Statutes, viz, the pleasure of the board of directors. (*Harrington v. First National Bank of Chittenango*, 1 N. B. C., 760; 1 *Thomp. & Cook*, 361; *Taylor v. Hutton*, 43 *Barb.*, 195.)

*Resignation of officer.*

- 5 (U. S. C. C., 1887). The law providing no particular mode by which a director is to resign from the board, an oral resignation would be as good as any. (*Movius v. Lee*, 30 *Fed. Rep.*, 298.)
- 6 (U. S. C. C., 1887). The president being the head of the board, a resignation to him is a resignation to the board. (*Ib.*)
- 7 (U. S. C. C., 1887). A director is not prohibited from resigning during the year. The apparent purpose of the provision in regard to the term of office is to make it conform to the time of the new election, and not to absolutely require every director to serve the full term. (*Ib.*)

*Compensation of officers.*

- 8 (U. S. C. C. A., 1899). Officers of corporations, who are also directors, and who have rendered their services under an agreement that they shall receive reasonable but indefinite compensation therefor, may recover as much as their services are worth, and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after the services are rendered. (*National Loan and Investment Co. v. Rockland Co.*, 94 *Fed. Rep.*, 335.)

## OFFICERS—Continued.

## GENERALLY—continued.

- 9 (U. S. C. C. A., 1899). Where, after the organization of a corporation, it was agreed and understood at an informal meeting of all the stockholders that the officers should be paid a reasonable compensation for their services, and by a by-law the board of directors was given power to fix the compensation of officers, their subsequent action in voting the president a reasonable salary for past services was legal, and a note of the corporation, executed to him therefor, was not without consideration. (Ib.)

*Directors are officers within the meaning of section 5209, Revised Statutes.*

- 10 (U. S. C. C., 1889). Directors of a national bank are "officers" within the meaning of Revised Statutes, section 5209, which makes it a misdemeanor for bank officers to make false entries in any book, report, or statement of the bank, with intent to deceive any of its officers. (United States v. Means et al., 42 Fed. Rep., 599.)

*National-bank examiner not an officer.*

- 11 (U. S. C. C., 1887). A national-bank examiner is not an officer or agent of the bank and has no authority as such to act for the bank and can not bind it by any act done in its behalf. (Witters v. Sowles's Assignees et al., 32 Fed. Rep., 762.)

*Officer may borrow of bank.*

- 12 (U. S. C. C., 1877). An officer may, in the ordinary course of business, borrow money of the association. (Blair v. First National Bank of Mansfield, 10 Chicago Legal News, 84; 2 N. B. C., 173.)

*Bank may repair property lawfully acquired.*

- 13 (U. S. C. C. A., 1899). A national bank which has lawfully acquired the title to property in payment of a debt has implied authority to make reasonable repairs thereon for the purpose of putting it in salable condition, and its directors can not be held personally liable for money so expended in good faith. (Cooper v. Hill, 94 Fed. Rep., 582.)

## BONDS OF OFFICERS.

*Acceptance of bonds.*

- 1 (Ky.). It is not necessary that national banking associations shall signify their approval of the official bonds of their officers by memoranda entered upon the journals or minutes of the directors. The acceptance is to be presumed from the retention of the bond, and from the fact that the officer is permitted to enter upon or continue in the discharge of his duties. (Graves v. The Lebanon National Bank, 10 Bush., 23.)
- 2 (Nebr. Sup., 1901). The fact that the bond of an assistant cashier of a bank was delivered to cashier of the bank, who was one of the directors, and that the assistant cashier entered upon the duties of his office under such bond, and that such bond was retained by the cashier of the bank, is sufficient to establish the acceptance of the bond, though no acceptance or approval of such bond is shown by the minutes of the board of directors. (Fiala et al. v. Ainsworth, 88 N. W. Rep., 135; 63 Nebr., 1.)

*Nature of sureties' undertaking.*

- 3 (Ind.). The engagement of a surety is a direct original agreement with the obligee that in the event his principal fails he will perform the original obligation, and whether it is entered into jointly with the principal or separately, the extent and character of the obligation are the same as to both, depending only upon the form in which it is expressed. (La Rose et al. v. The Logansport National Bank et al., 102 Ind., 332.)
- 4 (Ind.). The contract of the obligors, whether entered into separately or jointly with the principal, if by its terms it appears that the principal is separately bound by an original, independent contract, to

## OFFICERS—Continued.

## BONDS OF OFFICERS—continued.

which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform according to his original engagement, and that they will answer for his default in the event of failure, is a contract of guaranty. (Ib.)

- 5 (Ind.). The contract of the sureties in the bond of a bank cashier, conditioned for the faithful discharge of his duties by such cashier, is a contract of guaranty. (Ib.)

*Discharge of sureties, defenses.*

- 6 (U. S. C. C. A., 1900). The bond upon which the action was brought was given by the defendant company to indemnify the bank for which plaintiff was receiver against loss by fraudulent acts by M. as its president. The provisions of the bond requiring notice to be given the company only obligated the bank to give notice of the discovery of any default or loss under the bond, and to notify the company when M. engaged in gambling or speculation, or indulged in disreputable or unlawful habits or pursuits. *Held*, that the bank was not required to notify the company that M. was making numerous overdrafts on his personal account in the bank, if it did not know that they were made with fraudulent intent; and that the mere fact that they were made for fraudulent purposes would not relieve the company from liability under the bond. (Fidelity and Deposit Co. of Maryland v. Courtney, 2 Banking Cases, 633; 103 Fed. Rep., 599.)
- 7 (U. S. C. C. A., 1900). The knowledge of an individual director of a bank of misconduct on the part of its president which would amount to such a fraudulent act affecting the duties of the officer as would require notice thereof to the maker of such bond, in order to be binding on the bank must be knowledge acquired by the director when engaged in the business of the bank. - (Ib.)
- 8 (U. S. C. C. A., 1900). The bond required that the bank should "immediately" give the company notice of the discovery of any default or loss thereunder. *Held*, that the notice given by the bank's receiver complied with the requirement, if given without a longer delay than the circumstances made necessary; and whether it was so given was a question for the jury in an action on the bond. (Ib.)
- 9 (U. S. C. C. A., 1900). Such notice was general in its character, but it advised the company of the default, claimed the full amount of indemnity, and no objection was taken prior to such action. *Held*, that there could be no reasonable objection to the form of the notice. (Ib.)
- 10 (U. S. C. C. A., 1900.) The proof of claims which was required by such bond was furnished in time, as it was furnished as soon as the full particulars of the claim were developed so as to be capable of proof. (Ib.)
- 11 (U. S. C. C. A., 1900). The cashier of the bank, without express authority, could not bind the bank by filling in, signing as cashier, and sending to the maker of such bond a certificate of the prior official conduct of the bank's president, although he had charge of the bank's correspondence, and the certificate had been received in blank form in a letter from the maker of the bond to the bank requesting the bank to have the certificate filled in, signed, and forwarded. (Ib.)
- 12 (U. S. C. C. A., 1895). Plaintiff, as a receiver of a national bank, sued a former employee of the bank and a guaranty company upon a bond of indemnity against the fraudulent acts of such employee which contained a provision that it should be essential to the validity of the bond that the employee's signature be subscribed thereto. The defendants pleaded non est factum. The bond offered in evidence was not signed by the employee of the bank and there was no evidence that it had been executed by the defendant company. The

## OFFICERS—Continued.

## BONDS OF OFFICERS—continued.

court sustained defendants' plea and dismissed the suit. *Held*, no error. (*Blackmore v. Guarantee Company of North America et al.*, 71 Fed. Rep., 363.)

- 13 (U. S. Dist. Ct., 1888). Where a cashier's bond is given to the "National Bank of Sumter," the sureties are not released from liability for a default of the cashier because such default was permitted by the negligence and misconduct of the president and board of directors. (*Phillips v. Bossard et al.*, 35 Fed. Rep., 99.)
- 14 (Ind.). A failure to give notice to guarantors of the default of their principal, except in cases governed by commercial rules, is a matter of defense, and resulting damages must concur with such failure in order to work a discharge. (*La Rose et al. v. The Logansport Nat. Bank et al.*, 102 Ind., 332.)
- 15 (Ind.). The knowledge by an employer of the misconduct of an employee whose conduct and fidelity have been guaranteed by another, which will, if concealed, release the guarantor, must relate to the service in which the employee is engaged, and must be something more than mere moral delinquency unconnected with the subject-matter of the guaranty. (Ib.)
- 16 (Ind.). A continuing contract, guaranteeing the fidelity of a bank cashier, may be revoked by the guarantors without cause, upon proper notice, but the right must be exercised reasonably. (Ib.)
- 17 (Mass. Sup., 1874). A surety on the bond of a cashier of a national bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them. (*Tapley v. Martin*, 116 Mass., 275; 1 N. B. C., 611.)
- 18 (N. Y.). Where a cashier of a national bank made a loan on the security of the stock of the bank, it is no defense for the sureties in an action on the bond that such loan violated the national banking act. (*Walden Nat. Bank v. Birch*, 130 N. Y., 221.)

*False statements, in a newspaper publication, of resources and liabilities as a defense.*

- 19 (Del., 1900). False statements in a newspaper publication of resources and liabilities of a national bank will not discharge a surety on the bond of an officer of the bank. (*Lieberman v. First Nat. Bank of Wilmington*, 2 Pennewills, 416.)
- 20 (Ky.). Where the sureties of an officer can reasonably be presumed to have been deceived by the statement of the condition of the bank published just prior to the execution of the bond and to have been led to think that there was no deficit, whereas there had been a misapplication of a large part of the funds by the officer whose bondsmen they became, which fact would have been ascertained had the directors exercised ordinary diligence, the sureties are discharged from their liability. (*Graves v. Lebanon National Bank*, 10 Bush., 23.)

*President—Statement to surety company—Cashier's bond.*

- 21 (U. S. Sup. Ct., 1897). The making of a statement as to the honesty and fidelity of an employee of a bank for the benefit of the employee and to enable the latter to obtain a bond insuring his fidelity was no part of the ordinary routine business of a bank president. (*American Surety Co. v. Pauly*, 170 U. S., 133.)
- 22 (U. S. C. C. A., 1896). Prior to the issue of the bond sued on, the cashier and president of the bank had conspired to rob it and had been engaged in fraudulent practices. When application was made for the bond, the surety company required a certificate from the bank of the cashier's good character. Such certificate was made by the president without, so far as appeared, any direct authority from the board of

## OFFICERS—Continued.

## BONDS OF OFFICERS—continued.

directors or any knowledge by them that such certificate was made or required. *Held*, that the president's knowledge of the cashier's dishonesty was not to be imputed to the bank, so as to make it responsible for the misrepresentations contained in such certificate. (*American Surety Co. v. Pauly*, 72 Fed. Rep., 470; affirmed by U. S. Sup. Ct., 170 U. S., 133.)

- 23 (U. S. C. C. A., 1902). A bank cashier applying to a surety company for a bond accompanied the application with a statement as to his past conduct and the condition of his account, signed by the president of the bank, which was incorrect, though made in good faith. Such statement was not referred to in the bond issued. The president had no special authority to make it, and none of the directors knew of it until interposed as a defense in a suit on the bond, defendant claiming that the statement was either a false warranty by the bank or a misrepresentation by it of material facts, which induced defendant to execute the bond. *Held*, that making the statement was no part of the duties of the office of president and not within his implied powers or ordinary duties, but was his individual act, by which the bank was not bound. (*United States Fidelity and Guaranty Co. v. Muir*, 115 Fed. Rep., 264.)

## EXTENT OF LIABILITY ON BOND.

- 24 (U. S. Sup. Ct., 1898). The A. Surety Co. executed and delivered to the C. Bank a bond, insuring the bank against loss by any act of fraud or dishonesty of its cashier in connection with the duties of that office, or the duties to which, in the bank's service, he might be subsequently appointed, occurring during the continuance of the bond, and discovered within six months thereafter and within six months from the death, dismissal, or retirement of the cashier from the service of the bank. The bond provided that the surety company should be notified of "any act" of the cashier which might involve a loss for which the company would be responsible "as soon as practicable after the occurrence of such act shall have come to the knowledge" of the bank, and it required proofs of loss to be furnished to the surety company. The bank suspended payment and passed into the hands of a receiver, who afterwards notified the surety company of the discovery of dishonest acts of the cashier, furnished proofs of loss, and brought suit against the surety company on the bond.

*Held*—

1. In an action against the maker of a bond, given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the former, if consistent with the object for which the bond was given, must be adopted.

2. Under the condition of the bond in this case, requiring notice of acts of fraud or dishonesty, the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge; and it is not sufficient to defeat the plaintiff's right of action upon the policy to show that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant; though he may have had suspicions of irregularity or fraud, he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act that might involve the defendant in liability for misconduct.

3. When the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties

## OFFICERS—Continued.

## EXTENT OF LIABILITY ON BOND—continued.

of a cashier; but within the meaning of the bond he did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national-bank examiner, which lasted until the appointment of a receiver and his qualifications. *Held*, that the six months from "the death or dismissal or retirement of the employee from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named.

4. The making of a statement as to the honesty and fidelity of an employee of a bank for the benefit of the employee, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

5. The presumption that an agent informs his principal of that which his duty and the interests of his principal require him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal: and in such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them failed to disavow what was assumed to be said and done in his behalf.

6. When an agent has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. (*American Surety Co. v. Pauly* (No. 1), 170 U. S., 133.)

25 (U. S. Sup. Ct., 1898). This was an action upon a bond guaranteeing a national bank against loss by any act of fraud or dishonesty by its president. The bond was similar in its provisions to the one referred to in the case preceding this, and contained, among other provisions, the following: "Now, therefore, in consideration," etc., \* \* \* "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employee in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer, it being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employee, shall be prima facie evidence thereof."

*Held*—

1. That this language was susceptible of two constructions, equally reasonable, and that the one most favorable to the insured should be accepted, namely, that the required written statement of loss arising from the fraud or dishonesty of the president of the bank, based upon its accounts, was admissible in evidence if suit was brought and was prima facie sufficient to establish the loss.



## OFFICERS—Continued.

## EXTENT OF LIABILITY ON BOND—continued.

2. That within the meaning of the bond in suit, the president of the bank remained in its service at least up to the day on which the receiver took possession of books, papers, and assets. (*American Surety Company v. Pauly* (No. 2), 170 U. S., 160.)
- 26 (U. S. C. C. A., 1895). A bank employee's bond, conditioned for the reimbursement of any loss sustained by reason of fraud or dishonesty in connection with his duties, provided that any claim under the bond should embrace and cover only acts and defaults committed during its currency and within twelve months next before the date of discovery of the act or default upon which such claim was based. *Held*, that the bond did not cover a default committed more than twelve months prior to its discovery, which would, however, have been discovered within a year from its commission had not such discovery been prevented by the act of the employee in falsifying the books during the year preceding the discovery. 67 Fed. Rep., 874, reversed. (*Fidelity and Casualty Company of New York v. Consolidated National Bank*, 71 Fed. Rep., 116.)
- 27 (U. S. C. C. A., 1898). The making of a loan exceeding 10 per cent of a national bank's capital, in the absence of fraud, is not a breach of the cashier's bond. (*Mohrenstecher et al. v. Westervelt*, 87 Fed. Rep., 157.)
- 28 (U. S. C. C. A., 1898). To constitute a misapplication of the funds of a bank, it is necessary that some portion thereof shall be withdrawn from its possession or control, or that some conversion be made so as to deprive the bank of the benefit thereof. Mere renewal of notes already in the bank's possession does not, of itself, constitute a misapplication of funds. (*Ib.*)
- 29 (U. S. C. C. A., 1898). The cashier of a bank having made large purchases of real estate, one of the sureties on his bond made inquiries of several officers of the bank, actively engaged in its affairs, as to whether the cashier had borrowed money of the bank in order to make such purchases, and was informed that the purchases were for the benefit of the bank, that no liability accrued therefrom to the cashier to the bank, and that the cashier's total indebtedness to the bank was but a few hundred dollars. *Held*, that the bank was estopped subsequently to deny these statements, when the sureties had relied thereon, and the cashier had in the meantime become insolvent. (*Ib.*)
- 30 (U. S. C. C. A., 1896). A bond conditioned for the proper performance by a cashier of his duties "for and during all the time he shall hold the said office" binds the sureties for all such time, irrespective of the fact that he is reappointed at the beginning of each year. (*Westervelt v. Mohrenstecher et al.*, 76 Fed. Rep., 118.)
- 31 (U. S. C. C. A., 1896). In an action on a cashier's bond for damages arising from breach thereof by his misappropriation of money and making of excessive loans, the fact that the bank and its receiver have sued and obtained judgment upon notes taken by the cashier for such misappropriated money and excessive loans is no defense. (*Ib.*)
- 32 (U. S. Dist. Ct., 1888). The sureties on a cashier's bond, reciting that B. had been elected cashier of a bank to hold his office during the pleasure of the board of directors, are liable for any default occurring while he continues to act as cashier. (*Phillips v. Bossard et al.*, 35 Fed. Rep., 99.)
- 33 (U. S. Dist. Ct., 1888). A judgment against a defaulting cashier for embezzlement of \$5,500 in gold, taken by him from the vaults of the bank, does not estop the bank from bringing an action on his official bond to recover amounts subsequently discovered to have been appropriated by him by means of false entries and omissions to account for sums received by express. (*Ib.*)
- 34 (U. S. Dist. Ct., 1888). When the defalcations of a cashier exceed the amount of his bond, the bank need not credit on the bond sums collected from other sources, but may apply them in reduction of the unsecured balance. (*Ib.*)

## OFFICERS—Continued.

## EXTENT OF LIABILITY ON BOND—continued.

- 35 (U. S. C. C. A., 1904). Defendant, a surety company, executed a bond to plaintiff bank by which it undertook, for the term of one year, to indemnify plaintiff against loss sustained by the dishonesty of employees. Action was brought thereon to recover for loss alleged to have occurred during the term through the action of a bookkeeper in falsifying the account of a depositor so as to increase his apparent credit balance, by which he was enabled to and did overdraw his account to a large amount. Such false entries and overdrafts continued through four years, but defendant's bond covered only about three months of the last part of the bookkeeper's employment, there having been bonds with different sureties covering a portion at least of the previous time. The depositor's account was the ordinary running account, subject to check, and continuous during all the time, and no application of deposits to any particular item of debit was made by either party, nor by implication, there having at no time been an overdraft as shown by the books. The false entries and overdrafts continued for a part of the time after defendant's bond went into effect, but subsequent deposits made prior to the time the bookkeeper's employment terminated exceeded the checks paid during the same time in an amount greater than such overdrafts. *Held*, that the ordinary rule in such cases between debtor and creditor, that payments should be appropriated to the oldest item of indebtedness, could not be applied as against a surety whose obligation covered a distinct portion of the time during which the account was running, but that as between plaintiff and defendant all deposits made during the currency of the bond would be applied by the court to the debit items made during the same time, and, it appearing that they exceeded the sums drawn out, there was no loss to the bank during the term for which defendant was liable. (First National Bank of Nashville v. National Surety Co., 130 Fed. Rep., 401.)
- 36 (U. S. C. C. A., 1904). When there are different bonds given by a bank official, covering different periods of time, with different sureties, an unappropriated payment made by the common principal is not to be always applied by the court to the oldest obligation. Regard must be had to the responsibility of the different sureties, as limited by the period for which they respectively contract, as well as to the injustice that would ensue if collections received under one obligation are applied to the discharge of a liability under a preceding or succeeding term, with distinct sureties. (Ib.)
- 37 (Ind.). Where by a by-law of a bank its cashier is made responsible for the funds and valuables of the bank, it can not be implied that his bond would not become operative until all the other officers and employees were denied access to such funds and valuables nor that he is responsible for losses which may occur through the delinquencies of others. (*La Rose et al. v. Logansport National Bank et al.*, 102 Ind., 332.)
- 38 (Ind.). The bond of a bank cashier, executed and approved two weeks after he enters upon his duties, is upon sufficient consideration, and is operative at least from the date of its approval. (Ib.)
- 39 (Nebr. Sup., 1901). A condition in the bond of an assistant cashier of a bank that he will "honestly, faithfully, and efficiently discharge the duties of such position" is a guaranty not only of the personal honesty of such officer, but also a guaranty of his competency, skill, and diligence in the discharge of his duties. (*Fiala et al. v. Ainsworth*, 88 N. W. Rep., 135; 63 Nebr., 1.)
- 40 (Nebr. Sup., 1901). Within the scope of the cashier's authority, and so long as he is apparently acting on behalf of the corporation, the cashier's directions may control the assistant cashier and the teller, and the latter may not be required to look beneath the surface of his superior's acts. But when he is led to believe that the cashier is violating his own duty to the bank, and is taking the bank's funds

## OFFICERS—Continued.

## EXTENT OF LIABILITY ON BOND—continued.

for his own ends, irregularly, and without authority from the directors, the assistant cashier has no more right to aid in or connive at such appropriation than if it were being perpetrated by a stranger. (Ib.)

- 41 (Nebr. Sup., 1903). Where an officer of a bank gives a bond conditioned that he will "honestly and faithfully and efficiently" perform his duties, he and his sureties are liable for loss resulting from his negligence, even though the directors may not have used due diligence. (*Fiala et al. v. Ainsworth*, 5 B. C., 554; 94 N. W. Rep., 153.)
- 42 (N. Y.). The sureties of a national-bank cashier are liable for his misappropriation of stock held in his name but as collateral for a loan made by the bank. (*Walden Nat. Bank v. Birch*, 130 N. Y., 221.)
- 43 (N. Y.). The official bond of the cashier of a bank, given when first taking his office, is a continuing obligation, where its conditions are unlimited as to its duration, and his original appointment was for a definite period, and the by-laws of the bank provide that his appointment shall be during the pleasure of the board of directors, and the statute under which his appointment is made authorizes his continuance in office until he is dismissed at the pleasure of the board (Rev. Stat., sec. 5136, subd. 5), though he is reelected annually as an incident to fixing his salary for the ensuing year. (*Stevens v. Orton*, 43 N. Y. S., 792; 18 Misc. Rep., 538; *Same v. Smith*, id.; *Same v. White*, id.)
- 44 (Tex. Civ. App., 1895). The cashier of a bank, whose bond, with sureties, was conditioned that he would "faithfully and honestly discharge his duties as cashier, and account for all such moneys, funds, and valuables" as came into his hands, cashed a draft, payable to his order, amply secured by bills of lading of cotton, and duly forwarded the same, with the bills of lading, to a bank in another city for collection. The draft and bills of lading were lost in the mail. The cashier's bookkeeper, whose duty it was to check the statements and accounts with other banks, reported the draft as credited on their account with the bank to which they had been forwarded, and his accounts balanced according to his report. The agent of the railroad company, without production of the bills of lading and without the consent of the cashier, delivered the cotton to the consignee. *Held*, that the cashier was not liable on his bond. (*First National Bank of Kaufman v. Still* (Tex. Civ. App.), 32 S. W., 61.)
- 45 (Vt.). Under the provision of the national banking act empowering directors to appoint a cashier, and to dismiss him at pleasure and to prescribe by-laws, a by-law was adopted which provided that the cashier should hold office during the pleasure of the board, and a cashier was appointed for the year ensuing, who gave a bond providing for the faithful performance of his duties as cashier forever, so long as he should occupy the position. *Held*, that the sureties on the bond were not liable for defaults occurring after the first year. (*First Nat. Bank of Brandon v. Briggs's Assignees*, 37 A., 231; 69 Vt., 12.)

## EVIDENCE IN SUIT ON BOND.

- 46 (U. S. C. C. A., 1896). The bank having suspended business on November 12, 1891, but the cashier having continued in the service of the receiver until March following, when he resigned, *held*, that the services so rendered by him after November 12 were rendered to the bank none the less because its affairs were controlled by a receiver, and the surety company was not absolved from liability for acts discovered more than six months from November 12 but within six months from his resignation. *Held*, further, that a proof of loss under the bond, which set forth with reasonable plainness, and in a manner by which a person of ordinary intelligence could not be misled, that certain sums of money had been taken from the bank by means of acts of

## OFFICERS—Continued.

## EVIDENCE IN SUIT ON BOND—continued.

the cashier, described in such proof, was sufficient, though it failed to aver explicitly that a loss had been caused to the bank. (*American Surety Co. v. Pauly*, 72 Fed. Rep., 470.)

- 47 (U. S. C. C. A., 1896). The "teller's book" of the bank, which had been kept by one G., who died before the trial, was offered in evidence to show that on certain days no money was received for certificates of deposit. *Held*, that in connection with evidence of the course of business, by which, if received, such money would be entered in the book, the evidence was competent, though not conclusive. (*Ib.*)
- 48 (U. S. C. C. A., 1896). For the purpose of showing the dealings with the bank of the president, who was charged with having misappropriated the bank's money with the cashier's aid, the president's ledger account was put in evidence, together with the testimony of the bookkeeper who made the entries, and who swore that they were correctly made from the original deposit slips and checks furnished to him by the teller, who had died before the trial; that it had been the teller's duty to verify all deposit slips and to pay the checks, and that all such slips and checks, when reaching the bookkeeper's hands, bore marks indicating that they had been verified or paid by the teller. *Held*, that the account was competent and sufficiently proven. *Held*, further, that evidence of acts of fraud and dishonesty by the cashier, occurring before the date of the bond, and for which no claim was made against the surety company, but which were similar to the acts on which the claim was based, was admissible to show that the acts on which the claim was based were intentional, and not merely negligent or due to oversight. (*Ib.*)
- 49 (U. S. C. C. A., 1898). In a suit upon a bank cashier's bond, one of the sureties thereon was not allowed to testify to statements of bank officers in reference to the cashier's dealings with the bank, but the cashier himself was afterwards permitted to testify to practically the same effect as the testimony offered. *Held*, that the rejection was not harmless error, as the evidence could not be considered merely cumulative, in view of attacks made upon the cashier's credibility, and of his interest in misrepresenting his transactions, if illegal. (*Mohrenstecher et al. v. Westervelt*, 87 Fed. Rep., 157.)

## INSTRUCTIONS TO JURY IN SUIT ON BOND.

- 50 (U. S. Sup. Ct., 1902). In an action brought by the receiver of a national bank appointed by the Comptroller of the Currency upon a bond of indemnity given to hold the bank harmless against fraud of a specified officer, it was contended that the court erred in admitting in evidence a notice of the default of the officer, given to the surety company by the receiver within from ten to seventeen days after the discovery of the default, and in instructing the jury that the requirement in the bond that immediate notice should be given of a default was fulfilled by giving notice as soon as reasonably practicable and with promptness, or within a reasonable time. *Held*, that the trial court did not err in refusing to instruct, as a matter of law; that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay; and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice. (*Fidelity and Deposit Company v. Courtney*, 186 U. S., 342.)
- 51 (U. S. Sup. Ct., 1902). The court points out an error in excluding evidence, but further holds that as the very question which the jury would have been called upon to determine if the evidence had been received was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the evidence. (*Ib.*)
- 52 (U. S. Sup. Ct., 1902). If the court below in anywise erred it was in giving instructions which were more favorable to the defendant than was justified by the principles of law applicable to the case. (*Ib.*)

## OFFICERS—Continued.

## INSTRUCTIONS TO JURY IN SUIT ON BOND—continued.

- 53 (U. S. Sup. Ct., 1902). To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant, could only have served to mislead. (Ib.)
- 54 (U. S. C. C. A., 1898). Error in denying a motion to compel the plaintiff to elect between causes of action is cured by instructions eliminating all but one cause. (Mohrenstecher et al. v. Westervelt, 87 Fed. Rep., 157.)
- 55 (U. S. C. C. A., 1898). It is error to give instructions authorizing the jury, in determining whether a transaction by which the cashier of a national bank obtained possession of some of its funds was a misapplication thereof, to consider the fact that his indebtedness to the bank exceeded 10 per cent of its capital. (Ib.)
- 56 (U. S. C. C. A., 1898). Instructions that no devices for concealment, however elaborate, which a bank cashier may adopt to conceal a transaction amounting to a misappropriation of its funds can protect him are erroneous when there is no evidence of any concealment whatever in respect to the transaction in question. (Ib.)

## JURISDICTION IN ACTION ON BOND.

- 57 (U. S. C. C. A., 1893). A suit on the official bond of the cashier of a national bank conditioned for the faithful performances of the duties thereof "according to law and by-laws" of the bank involves a Federal question, and is maintainable in a Federal court, irrespective of the citizenship of the parties. (Walker et al. v. Windsor National Bank, 56 Fed. Rep., 76.)

## ACTION OF APPELLATE COURT WHERE MOTION ERRONEOUSLY DENIED BY TRIAL COURT.

- 58 (U. S. C. C. A., 1893). Where a motion for leave to file a plea in abatement for nonjoinder of parties was erroneously denied, and at the time of such ruling there appeared of record all the facts essential to such a plea, an appellate court will order the same judgment as if the plea had been filed and sustained. (Ib.)

## DIRECTORS.

*Term of office, resignation.*

- 1 (U. S. Sup. Ct., 1891). A director of a national bank is not precluded from resignation within the year by the provision in Revised Statutes, section 1545, that when elected he shall hold office for one year and until his successor is elected. (Briggs v. Spaulding, 141 U. S., 132.)

*Are officers within meaning of section 5209.*

- 2 (U. S. C. C., 1889). Directors of a national bank are "officers" within the meaning of Revised Statutes, section 5209, which makes it a misdemeanor for bank officers to make false entries in any book, report, or statement of the bank, with intent to deceive any of its officers. (United States v. Means et al., 42 Fed. Rep., 599.)

*Oath of director.*

- 3 (U. S. Sup. Ct., 1882). Prior to the act of February 26, 1881, a notary public holding his commission under a State had no authority to administer the oath required by section 5211, Revised Statutes; and therefore a cashier who made oath before such notary to a false statement of the condition of his association was not guilty of perjury. (United States v. Curtis, 107 U. S., 671.)
- 4 (R. I. Sup., 1869). By the provisions of section 44 of the national banking act, upon conversion of a State bank to a national bank, all the directors of the former become those of the latter until an election or an appointment by the national bank. Semble, that no oath is required from these ad interim directors, the oath prescribed by

## OFFICERS—Continued.

## DIRECTORS—continued.

section 9 of the aforesaid act being designated for those regularly elected by the national bank; but assuming its necessity, a majority of those who were the directors of the State bank before its conversion is necessary to make a quorum of the board of the national bank. (*Lockwood v. The Mechanics' National Bank*, 9 R. I., 308; 1 N. B. C., 895.)

- 5 (R. I. Sup., 1869). In all cases where an act is to be done by a corporate body, or a part of a corporate body, and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting where a quorum is present a majority of those present may act. (Ib.)
- 6 (R. I. Sup., 1869). Hence a by-law adopted at a meeting of six ad interim directors of a national bank which had twelve directors before its conversion is invalid, because not adopted by a majority or quorum of the board. (Ib.)

*Oath of, as to ownership of stock.*

- 7 (U. S. C. C., 1883). A notary of the city of Alexandria is authorized to administer the oath required by law to be taken by a director of the First National Bank of that city as to his ownership of the capital stock of such bank. (*United States v. Neale*, 14 Fed. Rep., 767.)
- 8 (U. S. C. C., 1883). When the oath is taken and subscribed by the accused it is complete, so far as the accused can make it, and if the notary, in certifying the fact of the oath having been taken, erroneously used the term "county" instead of "city," and used the seal of said bank instead of his own official seal, such error did not affect the oath taken. (Ib.)
- 9 (U. S. C. C., 1883). If accused took an oath in which he stated that he was the bona fide owner in his own right of the number of shares of stock then standing in his name on the books of the bank, and that the said shares were not hypothecated or in any way pledged as security for any loan or debt, and if he took it willfully, and not believing that he was stating the truth, it is perjury, if in point of fact he was not the owner of said stock or had pledged the same for a loan or debt. (Ib.)

*Directors' duties continue until receiver appointed.*

- 10 (U. S. C. C. A., 1894). It is a mistake to suppose that the directors of national banks cease to be such, and that their duty to the bank lapses when an examiner is put in charge of its fund, properties, and books by the Comptroller. (*Robinson v. Hall et al.*, 63 Fed. Rep., 222.)
- 11 (U. S. C. C. A., 1894). They were still as much the advisers of the bank examiner as they had been of the cashier, notwithstanding they were not invested by law with the control over him which they were empowered to exercise over the cashier. (Ib.)
- 12 (U. S. C. C. A., 1894). Their duty as directors does not cease until after the appointment of a receiver. (Ib.)

*Director's pledge of his stock.*

- 13 (U. S. C. C., 1883). An irrevocable power of attorney given by the accused, wherein he constituted and appointed a third party his attorney for the purposes therein set forth, being a general power covering any indebtedness of accused to said third party, is a pledge of the shares of stock owned by accused mentioned therein as long as there was any debt due by the accused to such third party. (*United States v. Neale*, 14 Fed. Rep., 767.)

*Disqualification of judge who is director.*

- 14 (Tex. Civ. App., 1904). A judge who is a director of a national bank can not try a case to which it is a party, since, by Revised Statutes, section 5146, he must necessarily be interested as a stockholder. (*Williams v. City National Bank*, 27 S. W., 147.)

## OFFICERS—Continued.

## CASHIER.

*Term of office.*

- 1 (U. S. C. C. A., 1896). The office of cashier of a national bank is not an annual office, but the term of the incumbent continues until he resigns or until he is removed or a successor is appointed by the board of directors of the bank. (*Westervelt v. Mohrenstecher et al.*, 76 Fed. Rep., 118.)
- 2 (U. S. C. C. A., 1896). Since the national bank act expressly provides that the cashier of a national bank shall hold his office subject to the pleasure of the board of directors, a by-law providing that a cashier shall hold his office for one year, and shall be elected annually, is nugatory, as is a reappointment in accordance with such by-law at the beginning of each year. (Ib.)

*Bank may sue on note payable to cashier.*

- 3 (Ala.). A bank may sue as payee on a note payable to its cashier, alleging either that the promise was made to the cashier for it, or that the cashier's name was used by adoption for that of the bank. (*Darby v. Berney National Bank*, 11 So., 881; 97 Ala., 643.)

*Cashier's violation of directions.*

- 4 (Ky. Appls., 1900). A bank cashier, by discounting a note which the board of directors had ordered him not to discount, violated his bonds. (*Cassell v. Mercer Nat. Bank of Harrodsburg*, 3 Banking Cases, 64; 59 S. W., 504.)
- 5 (Ky. Appls., 1900). The bank, by making efforts to collect the note, did not estop itself from suing on the cashier's bond for the loss sustained. (Ib.)

*When only bank may question his authority.*

- 6 (Minn.). The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative. (*Haugan v. Sunwal*, Minn., 62 N. W., 398.)

## POWERS OF AND REPRESENTATION OF BANK BY OFFICERS.

## POWERS OF DIRECTORS.

*Directors may empower officer to indorse its paper.*

- 1 (U. S. Sup. Ct., 1899). In June, 1892, the United States National Bank of New York, by letter, solicited the business of the First National Bank of Little Rock, Ark. The latter, through its president, accepted the proposition and opened business by inclosing for discount notes to a large amount. This business continued for some months, the discounted notes being taken up as maturing, until the Arkansas bank suspended payment and went into the hands of a receiver. At that time the New York bank held notes to a large amount, which it had acquired by discounting them from the Arkansas bank. These notes have been duly protested for nonpayment, and payment of the fees of protest, made by the New York bank, had been charged to the Arkansas bank in account. The receiver refused to pay or allow them. At the time of the failure of the Arkansas bank there was a slight balance due it from the New York bank, which the latter credited to it on account of the sum which was claimed to be due on the notes after the refusal of the receiver to allow them. The New York bank commenced this suit against the receiver to recover the balance which it claimed was due to it. The receiver denied all liability, and asked judgment in his favor for the small balance in the hands of the New York bank. It was also set up that the notes discounted by the New York bank were not for the benefit of the Arkansas bank, but for the benefit of its president, and that the New York bank was charged with notice of this. The judgment of the trial court, which was affirmed by the circuit court of appeals, was for the full amount of the notes, less the set-off. In this court motion was made to dismiss the writ of error on the ground that jurisdiction below depended on diversity of citizenship, and hence was final. *Held*, (1) that the

## OFFICERS—Continued.

## POWERS OF DIRECTORS—Continued.

receiver, being an officer of the United States, the action against him was one arising under the laws of the United States, and this court had jurisdiction; (2) that it was competent for the directors of the Arkansas bank to empower the president, or cashier, or both, to indorse the paper of the bank, and that, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and were executed as authorized; (3) that the set-off having been allowed by the New York bank in account, the receiver was entitled to no other relief. (*Auten v. United States National Bank of New York*, 174 U. S. Rep., 125.)

*Ratification by directors.*

- 2 (U. S. C. C. A., 1899). A contract by which a national bank assumed the liabilities of another bank was ratified by the directors of the national bank at a meeting where the presence of a certain member of its board of directors, who was a stockholder in the other bank, was necessary to constitute a quorum. There was no charge that such ratification constituted a fraud or imposition upon the national bank. *Held*, that the ratification was not void because voted for by such director. (*Schofield v. State Nat. Bank of Denver, Colo.*, 2 Banking Cases, 182; 97 Fed. Rep., 282.)

*Notice of meetings of directors.*

3. If the directors of a bank have long pursued an established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number were present, the custom would carry with it a standing notice to each director and enable those present to proceed, in the absence of a controlling by-law or statute. Unless it is otherwise provided, notice need not be given of fixed and stated meetings of directors.

(U. S., 1897) *American Exchange National Bank of New York v. First National Bank of Spokane Falls et al.*, 82 Fed. Rep., 961; (*Iowa*) *West Imp. Co. v. Des Moines National Bank*, 103 Iowa, 455.

- 4 (Conn.). Unless the articles of association or by-laws or a statute provide otherwise, the notice of a meeting of directors need not state the object of the meeting unless business out of the usual nature is transacted. (*Savings Bank v. Davis*, 8 Conn., 191.)

*Quorum of directors.*

- 5 (Kans. Sup., 1886). The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the association shall be arrived at and expressed only after a consultation at a meeting of the board attended by at least a majority of its members. (*National Bank v. Drake*, 35 Kans., 564; 3 N. B. C., 445.)
- 6 (Mass.). If it be customary to allow less than a quorum of directors to act, the doings of such less number will bind the corporation in regard to acts authorized by the customary mode of proceeding. (*National Security Bank v. Cushman*, 121 Mass., 490.)

*Individual directors do not represent corporation.*

- 7 (Kans. Sup., 1886). The election of an individual as a director does not constitute him an agent of the corporation with authority to act separately and independently of his fellow-members. It is the board duly convened and acting as a unit that is made the representative of the association. The assent or determination of the members of the board, acting separately and individually, is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the association shall be arrived at and expressed only after a consultation at a meeting of the board, attended by at least a majority of its members. (*First National Bank of Fort Scott v. Drake*, 35 Kans., 564; 57 Am. Rep., 193; 3 N. B. C., 445.)



## OFFICERS—Continued.

## POWERS OF DIRECTORS—Continued.

- 8 (Kans. Sup., 1886). To bind a national bank the directors must act together as a board; their separate individual assent is ineffectual. (Ib.)
- 9 (Mass., 1840). The board of directors of a bank is a body recognized by law, and to all purposes of dealing with others constitutes the corporation. (*Burrill v. President, Directors, etc., of the Nahant Bank*, 2 Metcalf, 163.)

*Sale of land by committee of directors.*

- 10 (Mass., 1840). A board of bank directors may delegate authority to a committee of its members to alienate or mortgage real estate; and such authority to convey real estate necessarily implies authority to execute proper instruments for that purpose and to affix the corporate seal thereto. (*Burrill v. President, Directors, etc., of the Nahant Bank*, 2 Metcalf, 163.)
- 11 (Mass., 1840). Where a board of bank directors authorized a committee of its members "to sell and transfer any estate owned by the bank," and the committee gave mortgage on the real estate of the bank to a creditor who had recovered judgment against the bank on its bills, and took from him at the same time a bond conditioned that he would not put those bills in circulation, and the board of directors accepted said bond and acted on it, and the cashier paid the costs of the suit in which said judgment was recovered, according to the agreement made between said creditor and said committee, it was *held* that, whether the committee had or had not authority to mortgage the estate, the mortgage had been ratified by the board of directors. (Ib.)

*Directors must authorize gratuitous bailment.*

- 12 (N. Y.). The executive officers of an association can not bind it as a gratuitous bailee unless they have a special authority from the board of directors so to do or there exists a general custom or usage to that effect. (*First National Bank of Lyons v. Ocean National Bank*, 60 N. Y., 278.)

*Directors' action proved by parol.*

- 13 (Wis., 1901). The act of the directors of a bank in releasing a mortgage by resolution may be proved by parol, witness testifying that he did not think this action appeared on their records, and there being no evidence that it did so appear. (*In re Bank of West Superior*, *Goodvin v. Nichols*, 3 Banking Cases, 322; 109 Wis., 672.)

## POWERS OF CASHIER.

## IN GENERAL.

*Is agent of corporation, and his acts bind it.*

- 1 (Ill. App.). A bank cashier is the agent of the bank in financial transactions with customers, and his acts will bind it, unless contrary to the provisions of the charter, or of general law, or against public policy. (*Squires v. First National Bank*, 59 Ill. App., 134.)
- 2 (Ind.). The vice-president of a bank, to procure a loan from another bank, represented that the loan was for his bank, and gave a note signed by himself and another director and indorsed by the bank by its president. Thereafter the note was renewed by another, executed by the same parties, except that the indorsement by the bank was signed by the cashier. The lending bank knew who were directors of the borrowing bank and that the cashier who made the indorsement transacted all of its business. *Held*, that although the indorsement was not authorized by the board of directors and the proceeds of the loan were not, in fact, received by the bank, but were misapplied by the officers who procured it, the bank was liable. (*First Nat. Bank of Huntington v. Arnold*, 156 Ind., 487.)

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## IN GENERAL—continued.

- 3 (Pa.). The cashier of an incorporated bank is the general executive officer to manage its concerns in all things not peculiarly committed to the directors; he is agent of the corporation, not of the directors. (*Bissell v. The First National Bank of Franklin*, 69 Pa. St., 415.)

*Usage of bank as affecting cashier's authority.*

- 4 (U. S. C. C., 1897). Under an allegation that the guaranty sued on was executed by the defendant bank in the name of its cashier, and that such cashier was authorized by a general usage to bind the bank to similar contracts, the plaintiff may prove any competent authority to the cashier, and is not restricted to proof of usage. (*Seeber v. Commercial National Bank of Ogden*, 77 Fed. Rep., 957.)
- 5 (U. S. C. C. A., 1897). The cashier of the Q. bank, who, in addition to his usual powers as such, was allowed by the officers to have full control of its business, applied to a bank in another city for accommodation, sending to the latter bank what purported to be the signatures of the officers of the Q. bank and a resolution of its directors authorizing him to borrow money and rediscount paper. Thereafter loans were made to the Q. bank on its notes, signed by the cashier in its name. It was customary for banks in the region where the Q. bank was located to borrow at certain seasons, and everything connected with the transaction was apparently done in the usual and regular course of business. *Held*, that the Q. bank was liable on the notes signed by the cashier, though it afterwards appeared that the signatures of the officers and the resolutions sent by him to the lending bank were forgeries, and the proceeds of the loans were used by him for his own benefit. (*City National Bank of Quanah, Tex., v. Chemical National Bank of St. Louis, Mo.*, 80 Fed. Rep., 859.)

## WHAT CASHIER MAY DO.

*May receive offers for bank's securities.*

- 1 (U. S. Sup. Ct., 1885). It is within scope of general authority of cashier to receive offers for purchase of securities held by the bank, and to state whether or not bank owns securities in its possession. (*Xenia Bank v. Stewart et al.*, 114 U. S., 224.)

*May certify checks when drawer has funds.*

- 2 (U. S. Sup. Ct., 1870). Where the money is in the bank the cashier has *virtuti officii* authority to certify a check to be good and charge the amount to the drawer. (*Merchants' National Bank v. State National Bank*, 10 Wall, 604; 1 N. B. C., 47.)
- 3 (N. Y. Sup. Ct.). The cashier of a bank, as one of its financial officers, in its daily and ordinary business transactions, has authority to certify checks drawn on the bank by its customers in all cases where any officer could do the same and bind the bank. (*Clarke National Bank v. The Bank of Albion, impleaded, etc.*, 52 Barb., 592.)
- 4 (N. Y. Sup. Ct.). This authority is regarded as general, growing out of a cashier's position in the bank, and persons dealing with the bank are not in any way affected or bound by the special restrictions and limitations imposed upon him by the corporation whose agent he is. (*Ib.*)
- 5 (N. Y. Sup. Ct.). A cashier has no power, however, to make the certification unless he has the funds of the drawer in hand to meet the check. This limitation on his general authority is, in the law, presumed to be known by all the bank's customers and others, who act upon the statements and representations of its agent. (*Ib.*)
- 6 (N. Y. Sup. Ct.). Neither has the cashier power, as the agent of the bank, to certify a check until on or after the day the same is made payable. (*Ib.*)

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## WHAT CASHIER MAY DO—continued.

*May reassign collateral on payment.*

- 7 (U. S. C. C.). It is within the general authority of the cashier of a bank to sign, in its behalf, a blank transfer upon a certificate of stock in the name of the bank held by it as collateral security for a loan, and deliver the certificate to the pledgor on payment of the loan. (Matthews v. The Massachusetts National Bank, 1 Holmes, 396.)

*Ratification of cashier's acts.*

- 8 (Ky. Appls., 1899). When the act of a bank cashier in crediting a customer by the proceeds of a draft presented to the bank was properly authorized and ratified, authority was thereby created in the cashier, by implication, to bind the bank by subsequent similar acts. (German Nat. Bank v. Grinstead et al., 2 Banking Cases, 50; 52 S. W., 951.)

## WHAT CASHIER MAY NOT DO.

*When can not bind bank to pay draft on customer.*

- 1 (U. S. C. C., 1893). Under section 5136 of the national-bank act the cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft. (Flanagan et al. v. California National Bank et al., 56 Fed. Rep., 959.)

*May not certify his own check.*

- 2 (U. S. C. C. A., 1900). The cashier of a bank has no authority by virtue of his office, to bind the bank by a certification of his own individual check drawn thereon; and as in this case he had neither real nor apparent authority, the certification was invalid. (Gale v. Chase Nat. Bank, 104 Fed. Rep., 214.)

- 3 (U. S. C. C. A., 1900). A creditor who receives payment of his debt in money in due course of business, and in good faith, can not be required to repay the money to one from whom the debtor illegally obtained it. (Ib.)

*May not bind bank on promise to pay his own note.*

- 4 (U. S. C. C. A., 1895). A cashier of a bank has no implied authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder. (State National Bank of St. Joseph v. Newton National Bank, 66 Fed. Rep., 691.)

*May not issue cashier's draft for his own debt.*

- 5 (U. S. C. C. A., 1900). The cashier of a bank, as such, has no authority to issue cashier's drafts to his own order in payment of his individual debts, and a creditor accepting a draft so drawn takes the risk of such lack of authority. (Gale v. Chase Nat. Bank, 104 Fed. Rep., 214.)

- 6 (U. S. C. C. A., 1900). To warrant the finding that the cashier of a bank had implied authority to issue cashier's drafts to his own order in payment of his individual debts, such as will bind the bank and protect a creditor in accepting a draft so drawn for a sum so large as to be out of the usual line of conduct in the banking business, a settled course of business must be shown, by which he was permitted, with the acquiescence of the directors, to exercise such authority during a series of years or in numerous transactions; and evidence that he had drawn not exceeding nine drafts in all in payment of his own debts, only four of which were to his own order, and all of which were issued within the preceding six months, is insufficient. (Ib.)

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## WHAT CASHIER MAY NOT DO—continued.

*May not release bank's debtor without payment.*

7 (Mo. App.). Where a statute creating a banking corporation provides that its affairs shall be managed by a board of directors, who shall appoint and remove a cashier and other employees, the power to discharge a surety on a note without payment can not be exercised by the cashier unless expressly delegated to him by the board of directors. (*People's Savings Bank v. Hughes*, 1 Mo. App. Rep'r, 549.)

8 (N. H.). Ordinarily the cashier of a bank has no authority to discharge its debtors without payment or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that he would have no further trouble from it. (*Cochecho National Bank v. Haskell et al.*, 51 N. H., 116.)

*May not take property for safe-keeping without authority.*

9 (N. Y. Appls., 1875). The cashier or other executive officer of a national bank has not, in the absence of special authority from the directors, or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping. (*First National Bank of Lyons v. Ocean National Bank*, appellant, 60 N. Y., 278; 1 N. B. C., 728.)

## EFFECT OF ACTS OUTSIDE CASHIER'S AUTHORITY.

*Cashier of bank not presumed to have the power to bind it as an accommodation indorser on his individual note.*

1 (U. S. Sup. Ct., 1877). The cashier of a bank is not, by reason of his official position, presumed to have the power to bind it as an accommodation indorser on his individual note, and the payee who fails to prove that the cashier as such had authority to make the indorsement can not recover against the bank. (*Western St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S., 557.)

*Cashier paying individual debt to correspondent bank with bank's funds—By sending bank's currency—By sending of draft on another bank made by himself to himself.*

2 (U. S. Sup. Ct., 1903). One who has in good faith and in payment of an existing debt received currency can not be compelled to repay the same, even though it subsequently develops that it had been embezzled, and the burden of showing fraud is on the person claiming the repayment. (*Rankin v. Chase National Bank*, 188 U. S., 557.)

3 (U. S. Sup. Ct., 1903). A collecting bank may not retain the proceeds of a draft in payment of the individual debt of a cashier where such draft was not drawn to his individual order, but by him as cashier to his order as cashier, and indorsed for deposit to his credit as cashier. (Ib.)

*Banks—Drafts issued by cashier to individual creditor—Implied authority.*

4 (U. S. C. C. A., 1904). A bank can not recover the amount collected on a cashier's draft issued by its cashier and made payable to its individual creditor, where it is shown that the cashier had on numerous previous occasions drawn similar drafts in payment of his own debts, and such acts had continued for a period sufficiently long to establish a settled course of business in the conduct of the bank which had been sanctioned by its officers, and was known, or should have been known, to its directors. (*Campbell v. National Broadway Bank*, 130 Fed. Rep., 699.)

*Officer acting outside his official duties not presumed to be authorized.*

5 (U. S. C. C. A., 1896). One who deals with the cashier of a national bank, professing to act on its behalf, in a transaction known to be outside the legitimate sphere of its operations, has no right to presume that

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## EFFECT OF ACTS OUTSIDE CASHIER'S AUTHORITY—continued.

the acts of the cashier have been sanctioned by the board of directors or other governing body, as no act done by an officer of an incorporated company in furtherance of a business venture which is in excess of the corporate powers can be said to be an act which is within the scope of the customary powers of such officer. (*Farmers and Merchants' National Bank v. Smith*, 77 Fed. Rep., 129.)

- 6 (U. S. C. C. A., 1896). Plaintiff bought a bond and mortgage from the defendant national bank through its agent, knowing, or having reason to believe, that the bank was acting only as a broker. After the purchase he accepted a guaranty against loss through defects in the title to the mortgaged premises, executed by the cashier of the bank, as such, making no inquiry as to the cashier's authority, but relying on his acting within the apparent scope of his duties. The bank received none of the proceeds of the sale, and profited in no way by the transaction. *Held*, that the bank was not bound by the alleged guaranty, nor estopped to deny the cashier's authority to execute it. (Ib.)

*Those dealing with cashier outside his ordinary official authority do so at their peril.*

- 7 (U. S. C. C., 1888). The cashier of a bank kept an account with the defendants, who were brokers, and bought and sold stocks for him, and from time to time the defendants received checks of his bank upon another bank, its correspondent, drawn by him in his official capacity, and collected them from the bank upon which they were drawn, and applied the avails to the cashier's individual account. In an action brought by a receiver of the bank of the cashier to recover of defendants the amount of the checks received by them. *Held*, the checks being made payable to the order of the defendants, for the cashier's individual use, the defendants took them under an obligation to ascertain at their peril that the cashier had authority outside of his ordinary official authority to make the checks, and could not assume that he was acting within the scope of his official duties. A purchaser of commercial paper made by an agent can not acquire any title to it as against the principal, unless he can show that it was made by the agent upon due authorization; and when he knows that the agent has made it in the name of the principal for his own use, he must be prepared to show that special authority in that behalf was delegated by the principal, and can not rely upon the implied or ostensible authority of the agent to make such paper in the ordinary business of the principal. (*Anderson v. Kissam et al.*, 35 Fed. Rep., 699.)
- 8 (U. S. Sup. Ct., 1892). The Third National Bank in New York was the correspondent of the Albion bank, a country bank. W., during part of the time in which the transactions in controversy took place, was cashier, and during the remainder was president of the Albion bank. During all the time W. practically managed that bank, and his co-directors and other officers had little or no oversight of its affairs. He was engaged in stock speculations on his own account in New York, and drew from time to time for his own purposes in favor of K. & Co., his brokers, on the bank balance with the Third National Bank. K. & Co. from time to time returned to that bank sums to be credited to the Albion bank. The latter bank eventually became insolvent, being ruined by fraudulent operations of W., who disappeared, and was put in the hands of a receiver, who brought suit against K. & Co. to recover the sums so paid to them by W. out of the balance to the credit of the bank with the Third National. K. & Co. claimed to offset the return payments made by them to the Third National, but the trial court ruled that they were not entitled to do it. *Held*, that the defendants were entitled to have it submitted to

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## EFFECT OF ACTS OUTSIDE CASHIER'S AUTHORITY—continued.

the jury whether the other directors and officers of the Albion bank might not in the exercise of proper and reasonable care have ascertained that these moneys had been deposited to the credit of the Albion bank, and whether they would or would not have accepted such deposits as the return of the moneys to the bank. *Anderson v. Kissam* reversed but propriety of rulings (in No. 7 above) in so far as they went to charge the defendants with liability for moneys obtained from the Albion bank not inquired into. (*Kissam v. Anderson*, 145 U. S., 435.)

*False statement outside official authority.*

9 (U. S. C. C. A., 1899). A bank can not be charged with responsibility as principal for the action of its cashier, performed as a director of a manufacturing company, in assisting to promulgate false statements as to the company's financial condition for the purpose of defrauding all of its creditors, including the bank, so as to affect the validity of the bank's claims against the company. (*Hadden v. Dooley*, 92 Fed. Rep., 274.)

10 (Conn. Sup., 1900). In an action by a bank as the indorsee of promissory notes, the fraud of its cashier, the indorser, by which the maker was induced to give the notes, can not be imputed to plaintiff, if not appearing that the bank had any knowledge of the fraud, except that inferable from the fact that the fraud was that of its cashier. (*First Nat. Bank of Willimantic v. Bevin*, 2 Banking Cases, 340; 72 Conn., 666.)

*When bank is liable for cashier's deceit.*

11 (U. S. C. C. A., 1902). The cashier of a bank is the proper officer to receive deposits and to give certificates or vouchers in respect thereto, which may properly include, with the consent of the depositor, a statement of the source from which the deposit arose; and for a false statement in that respect, made to subserve the interests of the bank, the latter is liable in tort to one injured thereby, although the cashier was not expressly authorized to make such statement by the board of directors. (*Hindman v. First Nat. Bank of Louisville et al.*, 112 Fed. Rep., 931.)

12 (U. S. C. C. A., 1902) To sustain an action for fraud and deceit, based on false representations by defendant by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false and (2) that the person making it knew it to be false; but if the fact was one within his means of knowledge, and he had no knowledge of it, a jury is authorized to find that the statement was knowingly false. (*Ib.*)

*Cashier pays individual debt with bank's deposit.*

13 (Tex. Civ. Appls., 1903). The cashier of plaintiff bank instructed defendant bank to apply plaintiff's deposit with defendant to the cashier's individual note. At the end of the month defendant sent plaintiff a statement showing said payment. *Held*, it was the duty of plaintiff's officers to examine defendant's statement and to notify defendant of any want of authority of the cashier within a reasonable time, and that failing to do so plaintiff could not recover. (*Iron City National Bank of Llano v. Fifth National Bank of San Antonio*, 5 B. C., 237; 71 S. W. Rep., 612.)

*Indorsement of bank's note to innocent holder.*

14 (Ark. Sup., 1899). A national bank is bound by the act of its cashier in indorsing a negotiable note belonging to it, when such note is taken by one without notice of the cashier's want of authority to indorse for the bank. (*Auten v. Manistee Nat. Bank*, 2 Banking Cases, 215; 67 Ark., 243.)

## OFFICERS—Continued.

## POWERS OF CASHIER—Continued.

## EFFECT OF ACTS OUTSIDE CASHIER'S AUTHORITY—continued.

*When cashier interested in transaction.*

- 15 (R. I. Sup., 1901). Plaintiffs were the assignees of a corporation which had a considerable deposit with the defendant bank. At the time of the assignment the defendant held three of the corporation's notes, which defendant's cashier, who was treasurer of the corporation, had personally indorsed. On the assignment the plaintiffs informed defendant's cashier of the same, who agreed to transfer the deposit account of the corporation to plaintiffs, and to honor the checks of one of them. *Held*, in an action to recover the balance of the deposits retained by the bank as a payment for the unpaid notes, that the defendant's cashier was not the proper bank officer with whom the plaintiffs should have dealt, because of his interest in the affairs of the corporation, and hence the agreement to transfer the deposit, being repudiated by the directors, was void. (*Ellis et al. v. First Nat. Bank of Woonsocket*, 3 Banking Cases, 346; 22 R. I., 565.)
- 16 (Wyo. Sup., 1902). A cashier of a bank, who was also a stockholder therein, had such an interest in a mortgage given to secure a note of which the bank was the beneficial owner as to render void the acknowledgment thereof taken by him. (*First Nat. Bank of Sheridan, Wyo. v. Citizens' State Bank of Dubuque, Iowa, et al.*, 5 B. C., 128; 70 Pac. Rep., 726.)

## POWERS OF PRESIDENT.

*Requires special authority to execute notes.*

- 1 (U. S. C. C., 1893). The president of a national bank has no power inherent in his office to bind the bank on the execution of a note in its name; but power to do so may be conferred on him by the board of directors, either expressly by resolution to that effect, or by subsequent ratification, or by acquiescence in transactions of a similar nature, of which the directors have notice. (*National Bank of Commerce v. Atkinson*, 55 Fed. Rep., 465.)

*Authority to borrow money.*

- 2 (U. S. C. C. A., 1893). If a president of a bank exercised the functions of a cashier and was the sole managing officer of the bank, he had authority to borrow money for the use of the bank in the regular course of its business. (*Simons et al. v. Fisher*, 55 Fed. Rep., 905.)

*Effect of deed by president.*

- 3 (U. S. C. C. A., 1899). The president of a national bank, who had exclusive charge of its affairs and owned a controlling interest, executed a deed to certain property of the bank under what purported to be a certified copy from the minutes of the board of directors to secure an advance to the bank, made in good faith, when the bank was legally in contemplation of insolvency. The deed was recorded on the day upon which the bank closed its doors. It did not appear from the minutes of the board of directors that the president had any authority to execute the deed. *Held*, that the deed was valid as an equitable mortgage, and sufficient to bind the bank's receiver. (*Stapylton v. Stockton et al.*, 1 Banking Cases, 262; 91 Fed. Rep., 326.)

*When may indorse for rediscount without special authority.*

- 4 (U. S. C. C. A., 1897). A rediscount by a bank of its bills receivable, though it indorses the same and becomes contingently liable for their payment, is not a borrowing of money by the bank, but has more the characteristics of a sale. (*United States National Bank v. First National Bank of Little Rock et al.*, 79 Fed. Rep., 296.)
- 5 (U. S. C. C. A., 1897). It is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary

## OFFICERS—Continued.

## POWERS OF PRESIDENT—Continued.

transaction of the bank's business, and a special authority to that end need not be conferred by the board of directors. (Ib.)

- 6 (U. S. C. C. A., 1897). When a bank has long been in the habit of rediscounting its bills receivable in large amounts, all other banks in the same locality pursuing the same practice, and the president and cashier of such bank propose to its regular correspondent a rediscount of its bills, and there are no circumstances attending such proposal to arouse suspicion, the bank to which it is made may safely act upon it, without further inquiry, on the assumption that the act has either been specially authorized or that the officers are acting within the purview of their general powers. (Ib.)
- 7 (U. S. C. C. A., 1897). When the directors of a bank have known for many months that its paper was being rediscounted in large amounts, under the president's direction, and without consulting the board, and that the money so obtained was being used in the business of the bank, and they have made no inquiry as to how the paper was indorsed, the bank is estopped to dispute the authority of the president to indorse such paper for rediscount. (Ib.)
- 8 (U. S. C. C. A., 1901). The president of a national bank, who has the actual management of its operations, is authorized to procure the discount of its paper. (*Hanover National Bank of City of New York v. First National Bank of Burlingame, Kans.*, 109 Fed. Rep., 421.)

*May assign judgment.*

- 9 (Iowa, 1896). The president of a bank has authority by virtue of his office to make a valid assignment of a judgment in favor of the bank. (*Guernsey v. Black Diamond Coal and Mining Co.*, 68 N. W., 777; 99 Iowa, 471.)

*May employ counsel without special authority.*

- 10 (Kans., 1894). The president of a banking corporation has power to employ counsel and manage the litigation of the bank in the absence of any order of the board of directors depriving him of such power. (*Citizens' National Bank of Kingman v. Berry*, 37 P., 131; 53 Kans., 696.)

*When authority to execute guaranty presumed.*

- 11 (Nebr. Sup., 1894). The authority of the president of a national bank to guarantee notes of third parties held and sold by the bank will be presumed in favor of a purchaser without notice to the contrary. (*Thomas v. City National Bank of Hastings*, 58 N. W., 943; 40 Nebr., 501.)

*Authority incident to office.*

- 12 (N. Dak. Sup., 1900). Where the members of the board of directors of a bank have for months ceased to exercise the functions of their offices, and have abandoned the management and control of the corporation business entirely to the president of the bank, it will be presumed that such officer was authorized to do, in the name of the bank, whatever the bank might lawfully do, and no special authorization or ratification of his acts need be shown. (*Tourteiot v. Whitehead*, 3 Banking Cases, 15.)
- 13 (W. Va.). The inherent powers of a president of a bank by virtue of his office are very limited, and it is difficult to say what powers he inherently possesses, if any, other than the power to take charge of the litigation of the bank by employing counsel and otherwise. (*The First National Bank of Wellsburg v. Kimberlands*, 16 W. Va., 555.)

*What authority may be conferred by directors.*

- 14 (W. Va.). A president of a bank may be authorized by its directors to do any act which they are authorized by their charter to do, unless



## OFFICERS—Continued.

## POWERS OF PRESIDENT—Continued.

the act to be done can by the charter be done only by the directors themselves. (*The First National Bank of Wellsburg v. Kimberlands*, 16 W. Va., 555.)

*Special authority may be implied from conduct.*

15 (W. Va.). Such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority. (*First National Bank of Wellsburg v. Kimberlands*, 16 W. Va., 555.)

16 (W. Va.). The inference that such authority has been impliedly conferred may be legitimately drawn by proving that he was in the habit of doing acts or making contracts of the same general character as the particular act or contracts which he has done or made and that these acts or contracts which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts which he was in the habit of doing or making were so very numerous and so variant in their character as clearly to justify the inference that he was authorized impliedly to do all acts and make all contracts which the directors had the power to do or to make and to confer on the president the right to do or to make. (Ib.)

## WHAT PRESIDENT MAY NOT DO.

*May not check on bank's account with another bank.*

1 (U. S. Sup. Ct., 1896). The president of a national bank has not, by virtue of his office, power to draw checks against an account kept by his bank with another bank. The statutes expressly provide that the power of the president of a national bank may be defined by the board of directors. (*Putnam v. United States*, 16 S. Ct., 923; 162 U. S., 687.)

*Use of bank's funds to pay individual debt.*

2 (U. S. C. C. A., 1894). C., in order to obtain a credit in his personal account with a bank of which he was the president, procured the defendants, a banking firm, to discount his individual note, credit the amount to the bank, and notify the bank that he had deposited the amount with them to the credit of the bank. The bank had previously given C. credit for the amount, and after being notified by the defendants that the deposit had been actually made with them, allowed C. to overdraw his account. Thereafter, and while his account with the bank was overdrawn, C., in his official character as president, authorized the defendants to charge the note to the account of the bank, and the defendants did so. *Held*, in a suit by the receiver of the bank to recover the deposit, that, unless expressly authorized to do so, the president of the bank could not use the funds of the bank to pay his personal obligation, and, there being no proof of such express authority, the authorization given by him to the defendants was not a defense to the claim. (*Chrystie et al. v. Foster*, 61 Fed. Rep., 551.)

*Use of bank funds to pay officer's debts.*

3 (U. S. C. C. A., 1899). In the absence of special authority from the directors of a bank, its president has no authority to draw drafts on its funds, in payment of personal debts. (*Lamson v. Beard*, 94 Fed. Rep., 30; 1 B. C., 568.)

*May not surrender securities without consideration.*

4 (Mich.). It is doubtful whether a general authority in the president of a bank to make discounts could empower him to make an arrangement under which the bank would surrender securities on receiving

## OFFICERS—Continued.

## POWERS OF PRESIDENT—Continued.

## WHAT PRESIDENT MAY NOT DO—continued.

others, which, it was at the same time agreed, should be mere nullities so far as the sureties were concerned. (*The First National Bank of Sturgis v. Bennett et al.*, 33 Mich., 520.)

*When may not execute guaranty.*

- 5 (Mich.). A guaranty against loss or liability for signing as sureties, given by a bank president in his own name and without authority from the directors, to those whom he had solicited thus to sign a note given to the bank to retire a prior note held by it against their principal is held to be the individual contract of the president, and not binding upon the bank. (*The First National Bank of Sturgis v. Bennett et al.*, 33 Mich., 520.)

*May not subscribe donations.*

- 6 (Nebr. Sup., 1894). The president of a national bank has no authority to subscribe money from the bank on condition that certain parties would erect a paper mill in the town. (*Robertson v. Buffalo County National Bank*, 58 N. W., 715; 40 Nebr., 235.)

*May not bind bank away from place of business.*

- 7 (Nebr. Sup., 1902). As a general rule, acts done by an officer of a bank away from its place of business, and not authorized or ratified, are not binding upon it. (*Jones v. First Nat. Bank of Lincoln*, 4 Banking Cases, 566.)

*President may not prefer himself to bank.*

- 8 (Tex. Sup.). The president of a bank, a large creditor, or his minor nephew, who promised, when the bank advanced money to such minor, that it should be repaid before he would attempt to collect his debt, and thereby made himself liable to the bank for such advance, can not in equity assert a preference lien for his own claim, given him in a deed of trust by the insolvent minor, as against the claim of the bank. 31 S. W., 216, affirmed. (*Brown v. Farmers and Merchants' National Bank of Cleburne*, 31 S. W., 285.)

## RATIFICATION OF PRESIDENT'S ACTION.

- 1 (U. S. Sup. Ct., 1893). Ratification of the unauthorized act of a national bank officer in borrowing \$200,000 for the bank can only be made, if at all, by the board of directors, acting with knowledge of the material facts, and can not be inferred from the mere fact that by direction of the same officer the money was placed to the credit of the bank, when it appears that it was drawn out by him and the assistant cashier and that no part of it came to the use or benefit of the bank. (*Western National Bank v. Armstrong*, 4 S. Ct., 572; 152 U. S., 346.)
- 2 (Nebr. Sup., 1894). The retention by a national bank of the proceeds of the sale and guaranty of notes owned by the bank is a ratification of the president's act in such selling, whether he was authorized to execute the guaranty or not. (*Thomas v. City National Bank of Hastings*, 58 N. W., 943; 40 Nebr., 501.)
- 3 (W. Va.). The directors of a bank may ratify any act done or contract made by the president without authority which they could have authorized him to do or to make. (*The First National Bank of Wellsburg v. Kimberlands*, 16 W. Va., 555.)
- 4 (W. Va.). The acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract unless the money so received is returned when its receipt becomes known to the directors. (Ib.)

## OFFICERS—Continued.

## POWERS OF PRESIDENT—Continued.

## MISCELLANEOUS.

*Negligent purchase of note subject to defenses.*

- 1 (U. S. C. C. A., 1897). The purchase of a note by the president and managing officer of a bank for which he paid from its funds over \$20,000, with knowledge that it was burdened with a guaranty made by the payee which might defeat its collection, is such negligence as renders him liable to account to the bank or its creditors for any loss which resulted. (*Stearns v. Lawrence*, 83 Fed. Rep., 738.)

*Liability of bank for fraud of president.*

- 2 (Ark. Sup., 1900). In an action for damages against the receiver of a national bank for deceit and fraud practiced upon plaintiff, by which it was induced to pay out a large sum of money for the worthless note of an insolvent company, it appeared that the president of the bank, as such, was endeavoring to collect a debt due it; for this purpose, the note was executed and delivered to him, and negotiated by him to plaintiff; that his letter to plaintiff by which he effected the sale of the note by making fraudulent statements as to the maker's condition, was written upon paper upon which was the bank's letter head; that he assumed in such letter that he was acting for the bank, and directed plaintiff to remit the proceeds to the bank, and signed the letter as president; and that it was his duty, as president, to endeavor to collect the debt. *Held*, that the bank was liable for the damages occasioned by this fraud, at least to the extent of the benefit received by it from the fraud. (*Binghampton Trust Co. v. Auten*, 2 Banking Cases, 502; 68 Ark., 299.)

*Notice to president as affecting bank.*

- 3 (Colo. Sup.). Where the president of a bank had been frequently told of a third ownership in property subsequently levied on by the bank, the bank was charged with that information, though the president gained it in his private business. (*Campbell v. First National Bank of Denver*, 43 P., 1007; 22 Colo., 177.)

*When directors may remove president.*

- 4 (N. Y. Sup., 1864). Where the articles of association of a national bank, signed by all the original stockholders and giving express authority to the board of directors to remove the president, have been transmitted to the Comptroller of the Currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws. (*Taylor v. Hutton*, 43 Barb., 195; 1 N. B. C., 755.)

*When president required to pay overdrafts.*

- 5 (Tex. Civ. Appls., 1894). Where the president of a bank has agreed to answer to a bank for the overdrafts of another person, the fact that the bank, in accordance with its custom, which was well known to the president, requires such person to give notes for his overdrafts at different times, which action was explained to the president and not objected to by him, did not release him from liability for the amounts. (*Brown v. Farmers and Merchants' National Bank of Cleburne, Tex.* Civ. App., 31 S. W., 216.)

*When president promises to pay loan.*

- 6 (Tex. Sup., 1895). The president of a national bank who requests the cashier to make advances to a minor, verbally promising that he will see them repaid, is liable to the bank for any loss sustained, by reason of said loans, as having been guilty of a breach of trust. (*Brown v. Farmers and Merchants' National Bank of Cleburne, Tex.* Sup., 31 S. W., 285; 88 Tex., 265.)

## OFFICERS—Continued.

## VICE-PRESIDENT.

*Fraud of vice-president.*

- 1 (Tex. Sup., 1901). A bank is not estopped by the false representations of its vice-president unless they are relied upon. (*Waxahachie Nat. Bank v. Beilharz*, 3 Banking Cases, 354; 94 Tex., 493.)

## AUTHORITY OF OFFICERS TO BORROW MONEY FOR BANK.

*Officers require special authority to borrow for bank.*

- 1 (U. S. Sup. Ct., 1893). The borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. (*Western National Bank v. Armstrong*, 152 U. S., 346.)

*Borrowing by bank officers, directors' authority—Usage between banks.*

- 2 (U. S. C. C. A., 1897). The rule announced in *Western National Bank v. Armstrong* (14 Sup. Ct., 572; 152 U. S., 346), that the vice-president or cashier of a national bank has no power to borrow money on its behalf unless specially authorized by the directors, is not applicable in a case where a general and long-established usage is shown between corresponding banks, prevailing in both cities where the lending and borrowing banks were respectively situated, of lending and borrowing through the executive officers of the banks, no further authority being furnished or demanded, the presumption being that such usage was known and acquiesced in by the directors of the borrowing bank in the absence of notice to the contrary to its correspondents. (*Armstrong v. Chemical National Bank of City of New York*, 83 Fed. Rep., 556.)

*Borrowing by bank officers, implied authority from directors.*

- 3 (U. S. C. C. A., 1897). The vice-president of a national bank was engaged in outside speculations, to which the cashier and teller were privy, and in which funds of the bank were used. All were directors. Two of the remaining six directors were employees of the vice-president, whom he had qualified to act by gifts of stock, and the remainder were selected by him for the purpose of giving him full control and management of the bank, which he exercised, borrowing money and pledging the securities of the bank therefor, and using large amounts of its funds and securities in his speculations, to the knowledge of a minority of the directors, and without inquiry or investigation on the part of any. *Held*, that such knowledge and conduct on the part of the directors gave implied authority to the vice-president to borrow money on behalf of the bank. (*Ib.*)

*Borrowing by bank officers—Passing of current accounts.*

- 4 (U. S. C. C. A., 1897). Where, by usage between two correspondent banks, one rendered a monthly statement to the other, which returned a reconciliation sheet noting any matter of difference, which was settled by correspondence, such a statement, showing a loan by the bank making it to the other, was notice of such loan to the directors of the latter, and a failure to notice or object to it was a ratification, though in fact the books of the borrowing bank showed the transaction to have been a deposit to its credit by its vice-president, and the amount was credited to his individual account and used by him, the discrepancy having been overlooked by the bookkeepers who checked the statement. In such case the negligence of the employees was chargeable to the directors, whose agents they were. (*Ib.*)

*Covert borrowing by bank.*

- 5 (U. S. C. C. A., 1897). If, for the purpose of enabling a bank to borrow without having its printed statements show it as a borrower, another bank credits a sum to the borrower's account, and charges the same to a special account, and takes an individual guaranty note from the

## OFFICERS—Continued.

## AUTHORITY OF OFFICERS TO BORROW MONEY FOR BANK—continued.

borrower's directors, amounts drawn on the credit constitute a loan to the bank and not to its directors. (*American Exchange National Bank of New York v. First National Bank of Spokane Falls et al.*, 82 Fed. Rep., 961.)

*Borrowing in directors' names.*

6 (U. S. C. C. A., 1897). Upon the question whether a loan was made to the defendant bank itself, and secured by a guaranty note of its directors individually, or was made to the directors upon their own note, there was conflicting testimony as to the original agreement, but it appeared that interest was charged to the bank, and by it entered on its books under profit and loss; that the note itself was a promise to repay loans made to the bank; that the bank's cashier, in transmitting the note, referred to it as a guaranty, and that the loan was credited to the bank and drawn on by it in the ordinary method and course. *Held*, that there was sufficient evidence of a loan to the bank to warrant a submission to the jury. (Ib.)

7 (U. S. C. C. A., 1897). On the question whether a loan was made to a bank or to its directors, the private arrangements of the directors as to how the transaction should be entered on the bank's books would not be controlling as against the lender. (Ib.)

*Contracts made for corporations by unauthorized agents.*

8 (U. S. C. C. A., 1897). A corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contract. (Ib.)

9 (U. S. C. C. A., 1897). The fact that the directors of a bank unite in making a guaranty note to secure a loan to the bank previously arranged for by the cashier is evidence of a ratification of the cashier's act. (Ib.)

*Notice of directors' meetings.*

10 (U. S. C. C. A., 1897). If the directors of a bank have long pursued an established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number were present, the custom would carry with it a standing notice to each director and enable those present to proceed, in the absence of a controlling by-law or statute. (Ib.)

*National bank may make oral contract to borrow money.*

11 (U. S. C. C. A., 1901). A national bank may make a binding oral agreement to repay money it borrows and to pay notes it procures to be discounted. (*Hanover Nat. Bank of City of New York v. First Nat. Bank of Burlingame, Kans.*, 3 Banking Cases, 533; 109 Fed. Rep., 421.)

*A national bank is liable for a deposit with it made at the request of its president in order that he might have the use of the money.*

12 (U. S. C. C., 1884). A., the president of defendant, a national bank in Vermont, applied to the plaintiff, a banking corporation in Canada, for a loan for his railroad of \$50,000, which he had been unable to obtain from defendant. Plaintiff's manager told him the money could not be loaned as an individual loan, as its individual loans were too near the limit allowed by law, but that it would deposit that amount with defendant if desired. A. assented, and they agreed the deposit should draw interest at 6 per cent while it remained, and that bonds should be deposited as security. Plaintiff drew two drafts for the amount on a Boston bank, delivered them to defendant, and received the collaterals, and entered the transaction on its books as a loan to defendant. Defendant indorsed the drafts, forwarded them to the Boston bank, from which it received credit for them, and has always retained their avails. About a year afterwards defendant failed, and a receiver was appointed, who rejected the claim of plaintiff when

## OFFICERS—Continued.

## AUTHORITY OF OFFICERS TO BORROW MONEY FOR BANK—continued.

presented for payment, and defendant brought suit. *Held*, that the transaction was not a loan to A. individually, but to defendant; that plaintiff was entitled to a judgment, to be paid by the Comptroller from the assets ratably with other claims, and that the amount due should be adjusted as of the time when the receiver was appointed, and so certified by the receiver to the Comptroller, to be paid in due course of administration. (*Eastern Township Bank v. Vermont National Bank of St. Albans and another*, 22 Fed. Rep., 186.)

*Authority of president to pledge deposit as security for loan.*

- 13 (U. S. C. C., 1893). In an action by the receiver of an insolvent national bank against the correspondent of the bank to recover money deposited by the bank with its correspondent, the evidence showed that the directors of a bank left it to the president to negotiate loans and to make such contracts as to repayment and security as were lawful and usual. *Held*, that the evidence was sufficient to establish the president's authority to pledge the deposit with the correspondent as security for loans made by the latter. (*Bell v. Hanover N. B.*, 57 Fed. Rep., 821.)

*Bank liable for money borrowed—Implied authority of officers.*

- 14 (Ind. Sup., 1901). The vice-president of a bank represented to another bank that he desired a loan for his bank, and gave a note signed by himself and another director, indorsed by his bank and its president. Thereafter such note was renewed by another note, indorsed by the bank by its cashier. The lending bank knew that the two directors signing the first note were directors of the borrowing bank and that the cashier signing the indorsement on the second note transacted all the business of the borrowing bank. *Held*, that, though the loan was not in fact procured for the bank, and though it did not receive the proceeds, and the indorsement was not authorized by the board of directors, the bank was liable, the officers having implied authority to act. (*First Nat. Bank of Huntington v. Arnold et al.*, 3 Banking Cases, 358; 156 Ind., 487.)

## WHEN BANK ESTOPPED BY ACT OF ITS OFFICERS.

- 1 (U. S. C. C., 1893). An officer of a bank borrowed money for its individual benefit, but in the name of the bank and upon a false certificate of deposit and collateral belonging to the bank. *Held*, that that his bank was estopped to deny the loan and is liable therefor, as the lender dealt with him solely in his official capacity. (*Stewart v. Armstrong*, 56 Fed. Rep., 167.)
- 2 (U. S. C. C., 1893). Vice-president of bank, also manager of a commercial house, substituted as collateral notes to order of his house, and indorsed by them without consideration. *Held*, that, as against holders of collateral, the house was estopped to deny that these notes were properly pledged as security for a loan to his bank. (Ib.)
- 3 (U. S. C. C., 1893). The estoppel upon his bank exists only in favor of lender. Hence, his house has no remedy against his bank for any liability enforced by the lender on account of its indorsed notes so pledged. (Ib.)
- 4 (U. S. C. C. A., 1897). The cashier of a bank does not act as its agent or representative in answering an inquiry addressed to him by another bank as to the business standing of a third person; and the bank is not bound or estopped by statements so made by him, his act being one not relating to the business of his bank, but simply one of customary courtesy rendered without consideration. (*First National Bank of Manistee, Mich., et al. v. Marshall and Ilsley Bank of Milwaukee, Wis.*, 83 Fed. Rep., 725.)
- 5 (U. S. C. C. A., 1897). The failure of the officers of a bank, in answering a general inquiry from another bank as to the character and stand-

## OFFICERS—Continued.

## WHEN BANK ESTOPPED BY ACT OF ITS OFFICERS—continued.

- ing of a customer, to disclose the fact that the customer was indebted to their bank, and that it held liens on certain of his property, will not estop it, to assert such liens as against a mortgage subsequently taken by the inquiring bank, in the absence of any fraudulent intent. (Ib.)
- 6 (U. S. C. C., 1880). Where the president of a national bank instructed his correspondent bank to charge up against the bank of which he was president the amount of a note given by him in payment of such note, and an account was rendered showing the transaction, the bank was estopped from denying the correctness of the charge in an action by a receiver, subsequently appointed, seeking to set aside the transaction. (*Burton v. Burley*, 13 Fed. Rep., 811.)
  - 7 (Ky. Appls., 1887). Where the cashier of a bank purchases bonds without authority of the bank, afterwards appropriates them to his own use, it is estopped to deny the authority of the cashier. (*Logan County Nat. Bank v. Townsend*, 3 N. B. C., 448.)
  - 8 (Mich., 1895). Where the cashier, intrusted by its directors with its entire management, has been accustomed in having paper rediscounted to guarantee its payment, the bank will be estopped from denying his authority to so guarantee it. (*First National Bank of Kalamazoo v. Stone*, 64 N. W., 487; 106 Mich., 367.)
  - 9 (N. H.). If upon inquiry by the surety, the cashier, knowing that he is a surety, inform him that the note is paid, intending that he should rely upon his statement, and the surety does so, and in consequence changes his position by giving up securities, or indorsing other notes for the principal, or the like, the bank will be estopped to deny that such note is paid. (*Cochecho National Bank v. Haskell et al.*, 51 N. H., 116.)
  - 10 (Utah, 1897). Where the manager of a bank, with the knowledge of its directors and without objection, continually exercises the authority to discharge guarantors of notes and accept collaterals in lieu thereof, the bank is estopped, after third persons have in good faith acted on such appearances, to deny his authority. (*Armstrong v. Cache Valley Land and Canal Co.*, 48 Pac. Rep., 690; 14 Utah, 450.)

LIABILITY OF BANK FOR OFFICER'S UNAUTHORIZED ACT WITHIN HIS APPARENT AUTHORITY.

- .....
- 1 (U. S. Sup. Ct., 1870). If a cashier without authority to buy coin in behalf of his bank, do so buy it, and it goes into the funds of the bank, the bank is liable on the principle of quantum valebat. (*Merchants' National Bank v. State National Bank*, 10 Wall., 604.)
  - 2 (N. Y. Appls., 1894). Where a cashier, in payment of his individual indebtedness, gives his creditor a cashier's draft drawn by himself on his bank's correspondent, and the same is received in good faith by the creditor, with no knowledge or notice that the draft is drawn fraudulently, and the same is paid by the correspondent to the creditor, the bank can not recover from the creditor the money so paid. (*Goshen National Bank v. State*, 36 N. E., 316; 141 N. Y., 379.)
  - 3 (N. Y. Appls., 1894). A bank is bound by the act of its cashier in drawing checks in its name, though with the intent of embezzling the proceeds, and payment of the checks by the drawee is binding on the bank. (*Phillips v. Mercantile National Bank of the City of New York*, 35 N. E., 982; 140 N. Y., 556.)
  - 4 (N. Y. Appls., 1894). Checks drawn by the cashier of a bank, payable to fictitious persons, whose names he indorses thereon, are in effect payable to the bearer, and the payment of such checks by the drawee is binding on the bank, as, in transmitting them made and indorsed, the bank is so far concluded by his acts as to be estopped from denying their validity. (Ib.)

## OFFICERS—Continued.

## LIABILITY OF BANK FOR OFFICER'S UNAUTHORIZED ACT WITHIN HIS APPARENT AUTHORITY—continued.

- 5 (N. Y. Appls., 1894). The fact that the payees in the checks, whose names were indorsed thereon by the cashier, were customers of the bank does not vary the rule applicable to fictitious payees, where the cashier did not intend to deliver the paper to the customers, as the fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name. (Ib.)
- 6 (N. Y.). Where one pays a debt due by him to a bank upon the demand of an officer thereof, whom he finds employed in its business, to said officer, over its counter, without knowledge that the officer's authority is so limited that he is not authorized to receive the money, it is a payment to the bank, and the latter is bound thereby. (*The East River National Bank v. Gove*, 57 N. Y., 597.)
- 7 (Okla., 1896). Where the president of a banking corporation, having control and management of its business, entered into a conspiracy with a merchant whereby the latter was to purchase of wholesale dealers a large amount of goods on credit, on which the bank was to take a mortgage in an amount largely in excess of a loan which was to be made the merchant, under which it was to sell the goods, the proceeds of such sale to be given one-third to the bank and two-thirds to the merchant, leaving the creditors unpaid; and in pursuance thereof, goods were bought of the value of \$10,000, on which the bank loaned \$1,000, taking a mortgage for \$9,960, and before the bills for the goods became due the bank foreclosed the mortgage and took possession thereunder, and sold the goods for \$5,300, which was divided according to the agreement—the bank was liable to each of the defrauded creditors for the amount of goods so sold by each. (*Johnstone Fife Hat Co. v. National Bank of Guthrie* (Okla.), 44 P., 192; 4 Okla., 17.)

## LIABILITY OF BANK FOR OFFICER'S UNAUTHORIZED ACT NOT WITHIN HIS APPARENT AUTHORITY.

- 1 (Colo. Sup., 1896). Mine owners indebted to a bank made their note, and executed a deed of trust to the bank's cashier to secure the indebtedness. The note was not paid at maturity, and without the payment of any money to him or to the bank and without authority the cashier released the deed of trust, and two other papers were executed between the parties. One was an absolute deed of the property to the cashier; the other an agreement whereby he was to work the mines till the indebtedness of the bank was paid from the proceeds and certain amounts paid to the grantors, after which he was to become the absolute owner. Subsequently a creditor of the bank attached the property as belonging to the bank. *Held*, that the bank could not be held to have adopted the contract of its cashier, since it must have done so in its entirety, and the agreement to operate the mines would have been ultra vires. (*Weston v. Estey*, 45 P., 367; 22 Colo., 334.)

## LIABILITY OF BANK FOR DIRECTOR'S AUTHORIZED ACT.

- 1 (Tex. Civ. Appls., 1894). A settlement of a claim against a bank made by a director who had been specially delegated by the bank to take charge of the matter, and who acted under the direct advice of the president of the bank, is binding on the bank. (*Waxahachie National Bank v. Vickery*, 26 S. W., 876.)



## OFFICERS—Continued.

## LIABILITY OF BANK FOR FALSE REPRESENTATIONS BY PRESIDENT.

- 1 (U. S. Sup. Ct., 1903). Where a national bank has sold certain bonds and the vendee has obtained a judgment for the purchase money in a State court on the ground that the sale was induced by false representations of the president of the bank, the judgment will not be reversed on the ground that the sale of the bonds was without the authority of the bank and was illegal and void. The fraud is prior to the sale and authorizes a rescission; nor can the bank claim that the fraud was perpetrated by an agent who did not represent it for illegal purposes. The bank must adopt the whole transaction or no part of it. (*National Bank and Loan Company v. Petrie*, 189 U. S., 423.)

## LIABILITY OF BANK FOR OFFICER'S CRIMINAL ACT WITHIN HIS APPARENT AUTHORITY.

- 1 (Ill. Appls., 1886). A national bank, by its cashier, issued its certificate of deposit for money to be paid on a note of the depositor or lent for his use. *Held*, that the bank was liable thereon, although the cashier embezzled much more of the bank's funds. (*First National Bank of Monmouth v. Brooks*, 22 Ill. App., 238; 3 N. B. C., 387.)

## LIABILITY OF BANK FOR FRAUDULENT REPRESENTATIONS AS TO FINANCIAL RESPONSIBILITY.

- 1 (U. S. C. C., 1893). A national bank is liable for fraudulent representations made by it through its cashier to another bank as to the financial responsibility of a customer. (*Nevada Bank of San Francisco v. Portland National Bank*, 59 Fed. Rep., 338.)
- 2 (U. S. C. C., 1893). Representations by one bank to another that a certain business corporation "is prosperous," "well organized," "doing a large business," and are "valued customers of ours," that an investigation of its business and responsibility had been made by the vice-president and cashier of the bank, coupled with the transmission of an annual statement, which (as alleged) is known to be false, are representations of fact, and not of opinion, and are actionable if fraudulently made. (Ib.)
- 3 (U. S. C. C., 1893). Fraudulent representations as to the financial responsibility of another for the purpose of procuring him credit are actionable, though containing no statement as to the amount of credit it is safe to extend. (Ib.)
- 4 (U. S. C. C., 1893). False representations concerning the financial responsibility of another, made for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, imply a fraudulent intent, and are actionable. (Ib.)
- 5 (U. S. C. C., 1893). The signature of a bank cashier, with his official title appended, to a letter bearing the bank's name at the head, is the signature of the bank, within the meaning of a statute providing against liability for representations as to the credit, skill, or character of another, unless there is a memorandum thereof in writing signed by the "party to be charged." (Ib.)
- 6 (U. S. C. C. A., 1899). A bank is liable for deceit where, through its board of directors, it causes false statements to be made in regard to the financial condition of a customer, for the purpose of furthering its own interests, by increasing its deposits or selling its collateral, and loss results to a third person from such statements. (*Hindman v. First Nat. Bank of Louisville*, 98 Fed. Rep., 562.)
- 7 (N. Y. Appls., 1903). In the absence of evidence of authorization, the cashier of a bank has no authority by virtue of his position to make any representations on behalf of the bank as to the solvency of a customer. (*Taylor v. Commercial Bank*, 5 B. C., 532; 66 N. E. Rep., 726.)

## OFFICERS—Continued.

## AUTHORITY OF OFFICERS TO BIND BANK IN RECEIVING SPECIAL DEPOSITS.

- 1 (Ga. Sup., 1877). A national bank which habitually receives special deposits for safe-keeping as matter of accommodation is bound by the act of its cashier in receiving on special deposit a package of stocks and bonds. The bank, though acting without reward, becomes a bailee and is responsible for gross negligence. (*The Chattahoochee National Bank v. Schley*, 58 Georgia, 369; 1 N. B. C., 379.)
- 2 (N. Y. Appls., 1875). A cashier or other executive officer of a national bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping. Quære as to the power of a national bank to become a bailee of property either gratuitously or for hire. (*First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y., 278; 1 N. B. C., 728.)
- 3 (N. Y. Appls., 1875). In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declarations and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank. (*Ib.*)

## LIABILITY OF BANK FOR CERTIFICATE ISSUED BY ITS OFFICERS WHEN NOT ACTING FOR THE BANK.

- 1 (N. Y., 1880). Where a national bank was in the habit of receiving money on deposit and issuing certificates, sometimes in its own name and sometimes in the name of its president, it is liable to a depositor who took a certificate issued by the president personally, but which the depositor believed to be an obligation of the bank and would not have taken otherwise. (*West v. Elmira Bank*, 20 Hun, 408.)
- 2 (Pa., 1880). A depositor asked for a certificate of deposit drawing interest for a portion of his deposit. The teller gave him a certificate issued by a private banking firm composed of the managing officers of the bank and told him that this was the bank's certificate. *Held*, that the bank was liable. (*Steckel v. First National Bank of Allentown*, 93 Pa. State, 376.)
- 3 (Pa.). A business man inquired of a bank president if the bank paid interest on deposits. He was informed that it did not, but that he would give him a certificate of a firm that would. He also informed him that the firm owned the bank and that he could get his money of the bank at any time. The firm failed and it was held that the bank was not liable. (*Allentown Bank v. Williams*, 100 Pa. State, 123.)
- 4 (Utah, 1892). A bank is not liable on a certificate of deposit issued before its organization and signed as cashier by one who afterwards became such. (*Long v. Citizens' Bank*, 8 Utah, 104.)

## WHEN ACT OF CASHIER AS TO DEPOSIT BINDS BANK.

- 1 (Ky., 1884). Where the cashier and general manager of a bank undertook to make investments for a depositor, and exhibited to the depositor, from time to time, statements, taken from the books of the bank, purporting to show investments made by the bank for him, it will be presumed that the officer of the bank was acting for the bank, and not as special agent for the depositor, and the bank will be required to account for the deposits or the investments. (*Bobb v. Savings Bank of Louisville et al.*, 64 S. W. Rep., 494; 3 Banking Cases, 760.)

## AUTHORITY OF OFFICERS DURING LIQUIDATION.

- 1 (U. S. Sup. Ct., 1890). The officers of a national bank which has gone into liquidation having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such

OFFICERS—Continued.

AUTHORITY OF OFFICERS DURING LIQUIDATION—continued.

- bank that its guaranty, made before liquidation, of certain notes shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders. (*Schrader v. Manufacturers' Nat. Bank*, 133 U. S., 67.)
- 2 (U. S. Sup. Ct., 1887). After an association goes into liquidation there is no authority on the part of its officers to transact any business in its name so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority has been expressly conferred by the shareholders. (*Richmond v. Irons*, 121 U. S., 27.)
- 3 (Kans.). Without express authority from the shareholders in a national bank, its officers, after the bank goes into liquidation, can only bind them by acts implied by the duty of liquidation. (*Elwood v. First Nat. Bank*, 41 Kans., 475.)

RECEIVER LIABLE FOR MONEY BORROWED BY BANK'S OFFICERS WITHOUT SPECIAL AUTHORITY.

- 1 (U. S. Sup. Ct., 1900). By using the money obtained from the New York bank by H. in his capacity of vice-president the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H., who assumed to represent it. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others without incurring liability for so doing. This case and *Western National Bank v. Armstrong* (152 U. S., 346), distinguished. (*Aldrich v. Chemical Nat. Bank*, 176 U. S. Rep., 618.)
- 2 (U. S. C. C. A., 1896). The receiver of an insolvent national bank is liable for money borrowed by the president of the bank without special authority when it appears that the bank actually received the money and appropriated it to its own use. (*Bank v. Armstrong*, 152 U. S., 346; 14 Sup. Ct., 572, distinguished. *Blanchard v. Commercial Bank of Tacoma*, 75 Fed. Rep., 249.)

BANK NOT LIABLE FOR CONDUCT OF CASHIER WHEN HE IS ACTING AS AGENT FOR THIRD PARTY.

- 1 (U. S. C. C., 1900). A bank is not chargeable with notice of the misappropriation of money by its cashier acting as agent for a third party in his individual capacity; nor is it liable to the principal for such money when it receives no benefit therefrom. (*School Dist. of City of Sedalia, Mo., v. De Weese*, 100 Fed. Rep., 705.)

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## COMMON-LAW LIABILITY FOR DECEIT.

*Directors liable at common law for deceit.*

- 1 (U. S. C. C., 1895). The liability of directors of a national bank to a common-law action of deceit for false and fraudulent representations made by them in the pretended performance of duties imposed upon them by the national banking law is not precluded by the liability imposed in that law for violation of its provisions. (*Prescott v. Haughey*, 65 Fed. Rep., 653.)
- 2 (U. S. C. C., 1895). Complaint alleging false and fraudulent representations by directors of a national bank in advertisements, statements, and reports as to its condition, whereby plaintiffs, relying thereon, were induced to deposit money with the bank, and were deceived and damaged, *Held*, to state a common-law cause of action for deceit, not removable as involving a Federal question. (*Ib.*)
- 3 (Nebr. Sup., 1899). The directors of an insolvent national bank are personally liable, at the suit of one purchasing the stock of such bank, for damages sustained by the reason of the insolvency of the corporation, when the plaintiff is induced to make such purchase by false representations of solvency, contained in reports made by the bank to the Comptroller of the Currency and attested by the directors, and published in pursuance of law, even though the directors were unaware that such reports and representations were false or untrue, and were made without intention to defraud. (*Gerner v. Mosher et al.*, 1 Banking Cases, 457; 58 Nebr., 135.)

*Liability of directors for deceit by false reports.*

- 4 (Nebr. Sup., 1899). Directors of a national bank who, in simulated performance of the duties prescribed by the law applicable to such an institution, relative to the preparation and publications of advertisements, statements, and reports, knowingly make and publish false statements and reports of the financial condition of the bank, with intent to deceive, and such matters are believed and acted upon by parties to their damage, are liable for the damages in an action for the deceit. (*Stuart v. Bank of Staplehurst*, 1 Banking Cases, 518; 57 Nebr., 569.)
- 5 (Nebr., Sup., 1899). The liabilities which are fixed in the national banking law for violations of its provisions are not exclusive, and do not preclude the action for deceit. (*Ib.*)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## COMMON-LAW LIABILITY FOR DECEIT—continued.

- 6 (Nebr. Sup., 1899). The petition in the case at bar held to state a cause of action for deceit, and not for relief under the national banking law, and to present no Federal question for adjudication. (Ib.)
- 7 (Nebr. Sup., 1899). The statements and reports which are required and are made to the Comptroller, and published in the newspapers, have among their purposes that of conveyance of information to those persons, each or all, who contemplate dealings with the bank in which its financial condition enters as a vital matter. (Ib.)

## LIABILITY OF DIRECTORS FOR MISMANAGEMENT.

*Not liable for fraud during his leave of absence.*

- 1 (U. S. Sup. Ct., 1891). If a director of a national bank is seriously ill, it is within the power of the other directors to give to him leave of absence for a term of one year instead of requiring him to resign, and if frauds are committed during his absence and without his knowledge, whereby the bank suffers loss, he is not responsible for them. (Briggs v. Spaulding, 141 U. S., 132.)
- 2 (U. S. C. C., 1887). The president of a national bank, being in failing health, was anxious to resign his position, but at a suggestion of a majority of the directors consented to take a year's leave of absence, and during such absence, and without any fault on his own part, losses were sustained by the bank, and it became insolvent. *Held*, in a suit by the receiver to charge the directors with such losses, that he was not liable. (Movius, Receiver, v. Lee et al., 30 Fed. Rep., 298.)

*Checking their own deposits after insolvency.*

- 3 (U. S. C. C. A., 1894). If directors were depositors, and knew two months or more before suspension that that event was inevitable, and that the bank could pay only a percentage of its deposits, and yet checked for the whole of their own balances, thereby diminishing the percentage to which other creditors would be entitled, they certainly defrauded to the extent of the diminution the creditors whose interests they were relied upon to protect, and should be held to strict accountability. (Robinson v. Hall et al., 63 Fed. Rep., 222.)
- 4 (U. S. C. C. A., 1894). Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They failed to record mortgages given to secure large debts due the bank even after they were aware of its insolvency, and erroneously advised an examiner who had taken charge of the bank that it was not necessary to record them. *Held*, that the directors were personally liable for the losses caused by such mismanagement and the fraud and defalcations of the cashier. Briggs v. Spaulding, 11 S. C., 924; 141 U. S., 132, distinguished. (Ib.)

*Officers jointly and severally liable for conversion.*

- 5 (U. S. C. C. A., 1899). When a loss has been caused to a national bank by the appropriation of its funds to a purpose unauthorized by law, or by culpable negligence, or conversion of its funds, the officers who participated in or consented to the act are jointly and severally liable for the entire amount. (Cooper v. Hill, 94 Fed. Rep., 582.)

*Officers liable for interest on funds converted.*

- 6 (U. S. C. C. A., 1899). When the directors and officers of a bank have misappropriated its funds, they are liable for interest on the amount from the date of the misappropriation as damages, and no statute is necessary to authorize the allowance of such interest by a court of equity. (Ib.)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## LIABILITY OF DIRECTORS FOR MISMANAGEMENT—continued.

*Increase of stock on fictitious assets is fraudulent.*

- 7 (U. S. C. C. A., 1898). The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by the directors with an understanding that they were not to be paid, is in violation of Revised Statutes, section 5142, and the directors of the bank participating are liable for all losses resulting to the creditors. (*Cockrill v. Abeles et al.*, 86 Fed. Rep., 505.)

*Limitations in action against directors—Renewal of certificate of deposit.*

- 8 (U. S. C. C. A., 1902). The issuance by a bank of a certificate of deposit for the amount of a former certificate which has matured does not create a new debt, but merely operates to extend the time of payment of the old debt, and a right of action in favor of the holder against directors of the bank, who, under the statute, have previously become liable for the payment of any debt "then existing or incurred while they remain in office," accrues at the time of the maturity of the certificate existing at the time the penalty was incurred, and not on the maturity of the new certificate. (*Patterson v. Wade*, 115 Fed. Rep., 770.)

*Director not liable after sale of stock and resignation.*

- 9 (U. S. C. C., 1887). A director of a national bank who, before the expiration of his term, sells his stock and orally resigns his office to the president, in his place of president at the bank, and afterwards receives the money for his stock prior to the sustaining of losses by the bank, ceases to be a director and can not be held liable for subsequent losses caused by the negligence of the directors. (*Movius, Receiver, v. Lee et al.*, 30 Fed. Rep., 737.)

*Delegation of authority does not release directors.*

- 10 (Utah Sup., 1899). A board of directors of a banking corporation is elected primarily for the management of the corporate affairs; and when the board delegates its authority to the executive officers and through their carelessness and mismanagement disaster and loss to the stockholders and creditors ensue, the individual members of the board can not escape liability by showing that they did not know of the unfortunate transactions and were ignorant of the business of the corporation. (*Warren et al. v. Robinson et al.*, 1 Banking Cases, 541; 19 Utah, 289.)

## DEGREE OF CARE REQUIRED OF DIRECTORS.

- 1 (U. S. Sup. Ct., 1891). The degree of care required of directors of corporations depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances. (*Briggs v. Spaulding*, 141 U. S., 132.)
- 2 (U. S. Sup. Ct., 1891). Directors of a corporation are not insurers of the fidelity of the agents whom they appoint who become by such appointment agents of the corporation; nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents unless the loss is a consequence of their own neglect of duty. (Ib.)
- 3 (U. S. Sup. Ct., 1891). Persons who are elected into a board of directors of a national bank about which there is no reason to suppose anything wrong, but which becomes bankrupt in ninety days after their election, are not to be held personally responsible to the bank because they did not compel an investigation or personally conduct an examination. (Ib.)
- 4 (U. S. Sup. Ct., 1891). Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers; but this does not

## OFFICERS, CIVIL LIABILITY OF—Continued.

## DEGREE OF CARE REQUIRED OF DIRECTORS—continued.

- absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention. (Ib.)
- 5 (U. S. C. C., 1887). The directors of a national bank which has become insolvent by reason of losses caused by the discount from time to time of paper not properly secured, indorsed by a director who is a man of wealth and the largest stockholder in the bank, and in whom the other directors have reason to place confidence, can not be held liable for the mere failure to discover the illegal transactions and to prevent such director from continuing therein. (*Movius, Receiver, v. Lee et al.*, 30 Fed. Rep., 298.)
- 6 (U. S. C. C., 1887). The officers of an insolvent national bank can not be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and, as they thought at the time, for the best interests of the bank, merely because such loans and discounts appear to have been unwise and hazardous when looked back upon. (*Witters, Receiver, etc., v. Sowles et al.*, 31 Fed. Rep., 1.)
- 7 (U. S. C. C., 1887). Bank directors can not be held personally liable for money paid out for dividends "to a greater amount than net profits, after deducting losses and bad debts" (Rev. Stat., sec. 5204), because there were debts bad in fact, but supposed to be good when the dividends were declared and paid. Bad judgment on the part of the directors as to the condition of the assets, without bad faith, does not make them individually liable. (Ib.)
- 8 (U. S. C. C., 1887). Directors of a national bank can not be held to the common-law liability for inattention to duty as directors in not preventing a hazardous, imprudent, and disastrous loan if such loan was made by their associates without their knowledge, connivance, or participation. (Ib.)
- 9 (U. S. C. C., 1897). The duty of the board of directors is not discharged by merely selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank in their hands without any other supervision or examination than mere inquiry of such officers, and relying upon their statement until some cause for suspicion attracts their attention. The board is bound to maintain a supervision of the bank's affairs, to have a general knowledge of the character of the business and the manner in which it is conducted, and to know at least on what security its large lines of credit are given. (*Gibbons v. Anderson et al.*, 80 Fed. Rep., 345.)
- 10 (U. S. C. C. A., 1898). In an action by the receiver of a national bank to charge the directors with liability for its losses, proof of general looseness of management on their part is not sufficient to cast upon them the burden of exonerating themselves, as the court can only charge them with losses shown to have resulted from their negligence. (*Warner v. Penoyer*, 91 Fed. Rep., 587.)
- 11 (U. S. C. C. A., 1898). The cashier of a national bank permitted an outside corporation in which he was interested to become indebted to the bank, by overdraft and discounts for the corporation and its members, in the sum of \$72,000, which was the principal cause of the bank's failure. The directors had appointed a discount and an examining committee, and acted upon their reports approving the statements of the cashier. The committees, in fact, made no independent examination, but merely checked the notes with a list furnished by the cashier. Such list, upon which they acted several months before the failure, showed eight notes for \$5,000 each. Though the bank's capital was but \$50,000, the members of the committee testified that they had no knowledge of such notes, nor of the fact of the large indebtedness of the corporation. *Held*, that they were guilty of negligence, which rendered them liable for the losses so sustained, but that the other

## OFFICERS, CIVIL LIABILITY OF—Continued.

## DEGREE OF CARE REQUIRED OF DIRECTORS—continued.

directors were not liable, there being no evidence that they knew of the negligent manner in which the committees acted. (Ib.)

- 12 (U. S. C. C. A., 1898). The directors of a national bank are not liable for losses occurring through malversations of the cashier, unless, by the performance of their own duty of general supervision in good faith and with ordinary care and intelligence, such losses would have been prevented. (Ib.)

*Degree of care required of directors of a savings bank in Missouri.*

- 13 (Mo. Sup., 1899). The defendant directors of an incorporated savings bank before its insolvency failed to discover that many loans were being made by the bank in violation of an express statutory provision, and to insolvent persons, and they left the entire management of its business to the cashier. Many of the sums of money so loaned having been lost by reason of the insolvency of the debtors, the bank became insolvent and made an assignment. *Held*, that such insolvency was the result of failure on the part of the directors to exercise ordinary care in the discharge of their duties. (Union Nat. Bank of Kansas City et al. v. Hill et al., 1 Banking Cases, 443; 148 Mo., 380; affirmed, 155 Mo., 279.)

- 14 (Mo. Sup., 1899). For the mere failure of such directors to exercise ordinary diligence and care, as such, in the management of the business affairs of the bank, by reason of which the bank became insolvent, they could not be held responsible at the suit of the bank's general creditors. (Ib.)

LIABILITY OF DIRECTORS FOR ASSENTING TO EXCESSIVE LOANS.

- 1 (U. S. C. C., 1887). Under Revised Statutes, section 5200, directors of a national bank who make or assent to the making of a loan to any one person of a sum exceeding one-tenth of the capital stock of the bank become personally and individually liable for all loss sustained thereby; but where the borrower in such a case is also one of the directors he is not so liable, but simply as a debtor to the bank. (Witters, Receiver, etc., v. Sowles et al., 31 Fed. Rep., 1.)
- 2 (U. S. C. C., 1888). A national bank was organized with a capital of \$60,000. The promoter of the bank took 380 shares of stock in his own name and procured the defendants to be directors, as well as a person to be elected cashier by them. The directors were not acquainted with the banking business. The proposed cashier was known to the directors, at least by reputation, and was supposed by them to be competent and trustworthy and of considerable experience in the business, and they had full confidence in his integrity and ability to take charge of the bank. The cashier acted as manager of the loan and discount business of the bank, and the directors merely as advisers when applied to. The promoter of the bank knew, and the other stockholders were presumed to know, that the directors were wholly unused to the banking business. *Held*, that the directors were not liable for the acts of the cashier in violation of the banking law done without their participation or knowledge. (Clews et al. v. Bardon et al., 36 Fed. Rep., 617.)
- 3 (U. S. C. C., 1888). The cashier made loans in excess of 10 per cent of the capital to a manufacturing corporation supposed by him and by the public to be entirely solvent. None of the directors knew of the loans when made, but after a loan of \$3,000 in excess of the lawful limit had been made the cashier informed one of them of such loan, and was by him advised to call it in when due; and thereafter such director's advice was asked as to a further discount to the same corporation, and he disapproved of it, and it was not made. Afterwards further loans or discounts were made to the same corporation without the knowledge or consent of any of the directors. About eight months after the bank commenced business one or more of



## OFFICERS, CIVIL LIABILITY OF—Continued.

## LIABILITY OF DIRECTORS FOR ASSENTING TO EXCESSIVE LOANS—continued.

the debtors of the bank failed, and the directors thereupon took the active management into their own hands. *Held*, that none of the directors had knowingly violated or knowingly permitted to be violated any of the provisions of the banking law, and were not liable for such violation by the cashier. (Ib.)

- 4 (U. S. C. C., 1888). Under the banking law the management of a national bank may be exercised either by the directors or by the cashier or other officers; therefore the directors are not liable for the illegal or negligent acts of the cashier or other officers by whom the bank is managed if they have no knowledge of such acts and do not connive at them or willfully shut their eyes and permit them. (Ib.)
- 5 (U. S. C. C., 1888). It seems that the liability of directors of a national bank is substantially the same under the banking law as at the common law. (Ib.)

## DIRECTORS' LIABILITY ON PUBLIC STATEMENT.

- 1 (U. S. C. C., 1891). Defendants, as directors, during a run on their bank posted conspicuously in the bank a notice, signed by them and addressed to the general public, representing the bank to be solvent. Plaintiff saw the notice, and, after a consultation with the directors, loaned the bank money, which was lost. *Held*, that the notice, not being addressed to plaintiff, could not entitle it to recover from the directors under R. L. Vt., section 983, which provides that no action shall be brought to charge any person upon a representation concerning the credit of another unless such a representation is in writing and signed by the party to be charged; and the fact that the notice was signed by defendants as directors would prevent a recovery from them individually, even if the notice were a sufficient representation in writing. (*First National Bank of Plattsburg v. Sowles et al.*, 46 Fed. Rep., 731.)

## , WHEN BANK OFFICER PERSONALLY LIABLE TO DEPOSITOR.

- 1 (U. S. C. C. A., 1901). An officer of a bank can not avail himself of the statute of frauds, requiring a promise to answer for the debt of another to be in writing to sustain an action thereon, to protect him from liability arising from a false and fraudulent statement made by him to a depositor in regard to the condition of the bank, by reason of which the depositor suffered loss. (*Kemp et al. v. National Bank of the Republic of New York*, 3 Banking Cases, 652; 109 Fed. Rep., 48.)
- 2 (N. C., 1895). A bank depositor, on rumors of its insolvency, went to withdraw his deposits, but was informed by the vice-president and director that the bank was perfectly solvent, and that "we have got all the money you want. You need never have any fears of this bank as long as I am in it." Such depositor, relying on such representations, permitted his deposit to remain. It was in fact insolvent when the representations were made. *Held*, that such vice-president and director was personally liable to such depositor for the money lost by the failure of the bank. (*Townsend v. Williams*, 23 S. E., 461; 117 N. C., 330.)

## PRESIDENT'S LIABILITY FOR MISMANAGEMENT.

- 1 (U. S. C. C. A., 1897). The purchase of a note by the president and managing officer of a bank, for which he paid from its funds over \$20,000, with knowledge that it was burdened with a guaranty made by the payee, which might defeat its collection, is such negligence as renders him liable to account to the bank or its creditors for any loss which resulted. (*Stearns v. Lawrence*, 83 Fed. Rep., 738, affirming *Lawrence v. Stearns*, 79 Fed. Rep., 878.)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## PRESIDENT'S LIABILITY FOR MISMANAGEMENT—continued.

- 2 (U. S. C. C. A., 1897). Where the president of a bank negligently purchased a note, subject to a condition which defeated its collection, the bank is entitled to recover from him, as a part of the loss resulting, the expense of an unsuccessful defense made by him for the bank to an action brought by the maker of the note to enforce the condition. (Ib.)

## PERSONAL LIABILITY OF CASHIER.

*Liable for reasonable care, skill, and diligence.*

- 1 (Ky., 1895). A cashier on whom, by continued absence of the directors, has devolved the duty of making loans and discounts will be liable for losses through overdrafts and discounts made by him only where it appears that he failed to make reasonable inquiry into the financial standing of those making the overdrafts, and those whose paper was discounted, and failed to exercise the care and discretion which an ordinarily prudent man would exercise in his own business. (*Pryse v. Farmers' Bank of Beattyville, Ky.*, 33 S. W., 532.)
- 2 (Tenn.). A cashier is bound to exercise reasonable skill, care, and diligence in the discharge of his duties, and if he fails so to do, and the bank suffer damage in consequence, he is liable therefor. (*Vance v. Mottley*, 21 S. W., 593; 92 Tenn., 310.)
- 3 (Tenn.). He is liable for loss on loans made by him through want of care, diligence, and reasonable skill. (Ib.)

*Liability for making excessive loans.*

- 4 (N. Y.). If a cashier, without authority from the directors so to do, makes a loan in excess of one-tenth of the capital of the association, he will be liable, in case of loss, for the amount of the excess. (*Second National Bank of Oswego v. Burt*, 93 N. Y., 233.)

*Concealment of defalcation, limitation.*

- 5 (Tenn.). Where the cashier of a bank conceals the defalcation of another officer the statute of limitations will not begin to run in favor of such cashier or his estate until such defalcation is disclosed to the directors or stockholders. (*Vance v. Mottley*, 21 S. W., 593; 92 Tenn., 310.)

*Cashier's tort may be waived.*

- 6 (Tenn.). Though the act of the cashier which occasions the loss is a tort, the tort may be waived and an action for value maintained against him or his estate. (*Vance v. Mottley*, 92 Tenn., 310.)

## ACTIONS TO ENFORCE LIABILITY.

## METHOD OF ENFORCING LIABILITY.

*Creditor may not sue after receiver appointed.*

- 1 (U. S. C. C. A., 1894). A creditor of an insolvent national bank that is in the hands of a receiver can not sue to enforce against officers and directors who have violated the banking laws the personal liability imposed by Revised Statutes, section 5239, as such liability is an asset belonging equally to all creditors, and must be enforced by the receiver. (*Bailey v. Mosher*, 63 Fed. Rep., 488.)

*Actions against directors under sections 5234 and 5239.*

- 2 (U. S. C. C., 1890). Revised Statutes, sections 5234 and 5239, prescribing the method of enforcing the liability of the directors of national banks for violation of the banking law, are exclusive of other remedies, and a creditor of an insolvent bank, for which a receiver has been appointed, can not sue its directors for the purpose of making them personally liable for the mismanagement of the bank. (*National Exchange Bank of Baltimore v. Peters et al.*, 44 Fed. Rep., 13.)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## METHOD OF ENFORCING LIABILITY—continued.

- 3 (U. S. C. C. A., 1899). A suit by a receiver of an insolvent national bank against its officers and directors to compel restitution of funds unlawfully diverted by them is one to execute a trust, and involves an accounting as to trust funds, and hence is of equitable cognizance. (Cooper et al. v. Hill, 94 Fed. Rep., 582.)
- 4 (U. S. C. C. A., 1899). A national bank has no power to prosecute a mining business on property which it has acquired, much less to expend its funds in prospecting for mineral on such property; and directors who authorize such expenditure are personally liable therefor to the bank or its receiver. (Ib.)
- 5 (U. S. C. C., 1896). An action against the directors of a national bank under the provisions of Revised Statutes, section 5239, can be maintained only by a receiver of the bank; and an action by a private individual against such directors for damages arising from the making of false reports or other violations of the national banking act can only be maintained as an action at the common law in the nature of an action of deceit. (Gerner v. Thompson et al., 74 Fed. Rep., 125.)

## FORFEITURE OF CHARTER NOT NECESSARY BEFORE RECEIVER MAY BRING SUIT AGAINST DIRECTORS.

1. The receiver of a national bank may maintain a suit to enforce the liability of directors under section 5239 without the charter of the bank having been first forfeited in a suit brought by the Comptroller of the Currency under that section.  
 (U. S. C. C. A., 1898) Cockrill v. Cooper et al., 86 Fed. Rep., 7;  
 (U. S. C. C., 1890) Stephens v. Overstolz, 43 Fed. Rep., 771, 772;  
 (U. S. C. C., 1897) National Bank of Commerce of Tacoma v. Wade, 84 Fed. Rep., 10, 13, 14;  
 3 Thomp. Corp., 4113-4303.

*Contra.*

- (U. S. C. C., 1890) Welles v. Graves, 41 Fed. Rep., 459, 468.  
 (U. S. C. C., 1896) Gerner v. Thompson et al., 74 Fed. Rep., 125, 131.  
 Hayden v. Thompson (U. S. C. C. A.) 71 Fed. Rep., 60, distinguished.

## ACTION AT LAW OR IN EQUITY.

*In equity, actions under sections 5200, 5204, and 5239.*

- 1 (U. S. C. C. A., 1898). A court of equity has jurisdiction of a suit against the directors of a national bank for excessive loans, under Revised Statutes, sections 5200, 5239, where the suit is against a large number of directors whose terms of service were not identical, where the excessive loans were inaugurated by one set of directors and continued, renewed, or enlarged by another, and where the directors were also charged with a violation of Revised Statutes, section 5204, in declaring dividends. (Cockrill v. Cooper et al., 86 Fed. Rep., 7.)

*At law, actions by receiver against director.*

- 2 (U. S. C. C., 1890). An action by a receiver of a bank whose charter has been forfeited under sections 5200 and 5239 against a director is properly brought at law, there being no necessity for invoking the aid of a court of chancery, either because of the nature of the issues involved or to avoid a multiplicity of actions. (Stephens v. Overstolz, 43 Fed. Rep., 771.)
- 3 (U. S. C. C., 1890). In such action plaintiff may state the aggregate amount of the excessive loans made to each party and the damage resulting therefrom in each case, accompanying each allegation with an exhibit showing the dates and amounts of the several loans that go to make up the aggregate sum stated in the petition, and is not compelled to declare in a separate count for each loan made. (Ib.)

## OFFICERS, CIVIL LIABILITY OF—(continued.)

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTION AT LAW OR IN EQUITY—continued.

*Contra.*

- 4 (U. S. C. C., 1890). The personal liability of directors of a national bank for violation of Revised Statutes, section 5204, by declaring dividends in excess of net profits, and of section 5200, for loaning to separate persons, firms, or corporations amounts exceeding one-tenth of the capital stock, can not be enforced in an action at law. (*Welles v. Graves et al.*, 41 Fed. Rep., 459.)

*Limitations.*

- 5 (U. S. C. C. A., 1890). The personal liability imposed by Revised Statutes, section 5239, upon directors for violation of the provisions of the banking act in favor of anyone injured thereby can not be enforced unless the charter has been forfeited and is a penalty within the meaning of section 1047, limiting actions for penalties to five years. (*Welles v. Graves et al.*, 41 Fed. Rep., 459.)
- 6 (U. S. C. C. A., 1898). Revised Statutes Arkansas, 1837, chapter 91, section 7, barring "all special actions on the case" after the lapse of one year, was repealed by implication by the code of procedure adopted in that State in the year 1868, except for certain specified actions. It accordingly has no application to an action on the case against the directors of a national bank under Revised Statutes, 5239, for making excessive loans, or for other acts, either of misfeasance or nonfeasance. (*Cockrill v. Butler*, 78 Fed. Rep., 679, reversed; *Cockrill v. Cooper*, 86 Fed. Rep., 7; 29 C. C. A., 529.)

## ACTIONS BY BANK AGAINST FORMER OFFICERS.

*Action against former officers for excessive loan.*

- 1 (U. S. C. C., 1897). A suit by a national bank against its former managing officers to charge them with losses sustained by reason of their having made loans to one individual in excess of 10 per cent of the capital stock, and other loans without personal security, in violation of the national banking statutes, the right of recovery being claimed under Revised Statutes, section 5239, is one arising under the laws of the United States. (*National Bank of Commerce of Tacoma, Wash., v. Wade et al.*, 84 Fed. Rep., 10.)
- 2 (U. S. C. C., 1897). A national bank may maintain a suit against its directors to enforce their liability under Revised Statutes, section 5239, for losses resulting from a violation of the statutory requirements in conducting the business of the bank. A suit by the Comptroller for dissolution of the association and an adjudication of such violations is not a condition precedent to the enforcement of such liability. (*Ib.*)
- 3 (U. S. C. C., 1897). A suit by a national bank against its former officers and directors, under Revised Statutes, section 5239, to recover for losses resulting from their mismanagement in violation of the provisions of the national banking law, is cognizable in equity where the transactions involved are complicated and the conversion of securities into money is required before the extent of the liability can be ascertained, and when, therefore, the remedy at law is not complete or adequate. (*Ib.*)
- 4 (U. S. C. C., 1897). The fact that a suit by the Comptroller for the forfeiture of the charter of a national bank for violations of the banking statutes is barred by limitation does not operate to bar a suit by the bank against its officers and directors, under Revised Statutes, section 5239, to charge them with losses resulting from such violations. (*Ib.*)
- 5 (U. S. C. C., 1897). The statute does not commence to run against a suit by a national bank against its managing officers to enforce their liability under Revised Statutes, section 5239, for losses resulting from acts in violation of the national banking law, until such officers have surrendered control of the bank to their successors. (*Ib.*)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY SHAREHOLDERS.

*Shareholder's remedy, when equitable.*

- 1 (U. S. C. C., 1893). A stockholder in a national bank can not maintain an action at law against the officers and directors thereof to recover damages for willful waste of the assets, whereby the value of his shares was decreased and he became liable to an assessment thereon. His remedy must be sought in equity. (*Hirsh v. Jones et al.*, 56 Fed. Rep., 137.)
- 2 (Mich. Sup., 1900). Where one of the directors of a national bank charged with negligence in the management of its affairs, which is alleged to have resulted in its insolvency, is its receiver, a shareholder may maintain a suit against the directors to have them decreed to pay the amount lost by such negligence; and the refusal of such receiver to bring the suit in behalf of the bank is not a prerequisite to the filing of the bill. (*Flynn v. Third Nat. Bank of Detroit et al.*, 2 Banking Cases, 212; 122 Mich., 642.)
3. But where the receiver refuses to bring an action against negligent directors to recover the amount which the shareholders have been compelled to contribute to pay the debt of the association, an action against such directors may be brought by a shareholder on behalf of himself and the other shareholders.  
 (N. J.) *Ackerman v. Halsey*, 37 N. J. Eq., 356;  
 (N. Y.) *Nelson v. Burroughs*, 9 Abb. N. C., 280;  
 (N. Y.) *Brinckerhoff v. Bostwick*, 88 N. Y., 52;  
 (Tenn.) *Wallace v. Lincoln Savings Bank*, 89 Tenn., 630.
- 4 (Ohio). Where the directors of a national bank have violated the provisions of the national banking act, to the damage of the bank and its shareholders, and the bank fails upon request to bring an action against such directors for the recovery of such damages, an action may be maintained for that purpose by a shareholder; but such action must be brought by such shareholder on behalf of himself and all the other shareholders, the bank must be made a party, the judgment must be in its favor, and the proceeds of such judgment will inure to the common benefit of all the shareholders alike. Such action may be brought in a State court. (*Zinn v. Baxter et al.*, 4 Banking Cases, 74; 62 N. E. Rep., 327; 65 Ohio St., 341.)
- 5 (Ohio). In such case a shareholder can not maintain such action for his benefit alone while the bank is a going concern and has not been dissolved by proper action by the Comptroller of the Currency in a Federal court. (*Ib.*)
- 6 (Ohio). One who has been a shareholder in a national bank, but has parted with his stock, can not maintain such action against the directors before the dissolution of the bank by the proper proceedings in a Federal court. Whether he can do so after such dissolution is not involved in this case, and is not hereby decided. (*Ib.*)

*When shareholder can not sue.*

7. A shareholder of a national banking association can not maintain an action against the directors to recover damages sustained for neglect and mismanagement of the affairs of the association whereby it became insolvent and its stock was rendered worthless. Such an action can be brought only by the corporation itself.  
 (U. S. C. C., 1891) *Howe v. Barney*, 45 Fed. Rep., 668;  
 (N. J.) *Conway v. Halsey*, 15 Vroom, 462.

*Stockholder may not sue after receiver appointed.*

- 8 (U. S. C. C., 1891). A stockholder in an insolvent national bank for which a receiver has been appointed can not sue its directors to make them personally liable for the mismanagement of the bank, as the right of action is in the receiver and not in the individual stockholder. (*Howe v. Barney et al.*, 45 Fed. Rep., 668.)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTION BY SHAREHOLDERS—continued.

*Where shareholder can sue.*

- 9 (U. S. Sup. Ct., 1897). A stockholder of an insolvent national bank may bring a suit in a State court, in behalf of the bank and himself, as a representative stockholder, against the directors, to recover money alleged to have been lost through their negligence and breach of trust, when the bank's officers, the receiver, and the Comptroller of the Currency have all refused to bring such a suit. (*Ex parte Chetwood*, 165 U. S., 443.)
- 10 (N. Y. Appls., 1882). The State courts have jurisdiction of an action brought by a shareholder on behalf of himself and other shareholders to recover of the directors of an insolvent association damages for injuries resulting from their negligence and misconduct. (*Brinckerhoff v. Bostwick*, 88 N. Y., 52.)

*Action by one shareholder for all.*

- 11 (N. Y., 1882). And when the receiver is a director and one of the parties charged with misconduct and against whom a remedy is sought, the action may be brought by a shareholder on behalf of himself and the other shareholders. (*Brinckerhoff v. Bostwick*, 88 N. Y., 52.)

*Actions by stockholders against directors, injunction.*

- 12 (U. S. C. C., 1869). The circuit court has jurisdiction, at the suit of a stockholder, to enjoin the officers of a national bank from any misapplication of its funds which might result from any act not warranted by its charter, or which would amount to a breach of trust. (*Shoemaker v. The National Mechanics' Bank*, 1 N. B. C., 169; 2 Abbott, U. S., 416.)

*Limitation of action against director for impairment.*

- 13 (N. Y.). An action by stockholders of a national bank against directors to recover for negligence which resulted in a loss of the bank's capital may be brought at any time within ten years. (*Hadna v. People's Nat. Bank*, 71 N. Y. S., 1076; 35 Misc. Rep., 517.)

## ACTIONS BY DEPOSITORS AGAINST DIRECTORS.

- 1 (U. S. C. C. A., 1904). The national bank act, providing for the administration of the affairs of an insolvent national bank by a receiver appointed by the Comptroller of the Currency, does not prevent the depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. (*Boyd et al. v. Schneider et al.*, 131 Fed. Rep., 223.)
- 2 (U. S. C. C. A., 1904). Where several depositors of a national bank had claims against a number of the bank's directors arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, such depositors were entitled to maintain a single suit against such directors in equity. (*Ib.*)
- 3 (U. S. C. C. A., 1904). Where the right of each of several depositors of an insolvent national bank to recover against several of the bank's directors, made parties to the bill, was based on the same theory, the bill was not multifarious. (*Ib.*)
- 4 (U. S. C. C. A., 1904). Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect. (*Ib.*)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY DEPOSITORS AGAINST DIRECTORS—continued.

- 5 (U. S. C. C. A., 1904). That certain of the defendants sued were not directors of an insolvent bank at the time acts of mismanagement complained of occurred did not exempt them from liability to the depositors where it appeared that during their term of office dividends were paid from the capital, which was also alleged as a ground of action. (Ib.)

*Contra.*

- 6 (U. S. C. C., 1890). Revised Statutes, sections 5234, 5239, prescribing the method of enforcing the liability of the directors of national banks for violation of the banking law, are exclusive of other remedies, and a creditor of an insolvent bank, for which a receiver has been appointed, can not sue its directors for the purpose of making them personally liable for the mismanagement of the bank. (National Exchange Bank of Baltimore v. Peters et al., 44 Fed. Rep., 13.)

## RECEIVER'S SUIT AGAINST DIRECTORS.

*Receiver's suit against directors; action; practice.*

- 1 (U. S. C. C., 1887). A bill brought to charge the directors of an insolvent national bank with the amount of losses caused by the bank's failure alleged that one of the defendants sold and transferred his stock on the day named, but the evidence showed that defendant had not paid anything for the stock, but delivered it to a messenger of another one of the defendants, from whom he had agreed to purchase it, and that such defendant then sold and indorsed the stock to a third party, as it was agreed he might do if he so desired. Plaintiff moved to amend the bill to conform to the proofs and make it allege that the transfer was merely formal. *Held*, unnecessary. (Movius, Receiver, v. Lee et al., 30 Fed. Rep., 298.)
- 2 (U. S. C. C., 1887). A receiver of an insolvent national bank, in his own name or in the name of a bank, may enforce against the directors, for the benefit of the stockholders, depositors, and other creditors of the bank, any right or claim resting upon the nonperformance or negligent performance of their duties that the bank itself could have enforced. (Ib.)

*Receiver may sue directors for fraud.*

- 3 (U. S. C. C. A., 1898). A receiver of an insolvent national bank has a right to maintain a suit in his own name against directors to charge them for losses that may have been sustained by the corporation and its creditors through their wrongful or fraudulent acts. (Cockrill v. Abeles et al., 86 Fed. Rep., 505.)

*Receiver may sue director for gross negligence.*

- 4 (U. S. C. C., 1897). A receiver of a national bank may sue the directors to hold them responsible for the malfeasance of the managing officer when it appears that they were so negligent as to make practically no examination of its books or affairs, and to hold meetings only at rare intervals, and then to limit their business almost wholly to the election of directors and the declaration of dividends. In such case their liability for losses should begin at a time when they ceased to discharge the duty of giving proper supervision to the conduct of the bank's affairs. In the circumstances of the present case they were held liable from the time when, by reason of their failure to earn dividends for more than a year, their attention should have been drawn to the necessity of making a thorough examination. (Gibbons v. Anderson et al., 80 Fed. Rep., 345.)
- 5 (N. Y., 1882). An action may be brought by a receiver of a national bank against its directors to recover damages sustained by their gross negligence. (Brinckerhoff v. Bostwick, 88 N. Y., 52; 3 N. B. C., 591.)

## OFFICERS, CIVIL LIABILITY OF—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## RECEIVER'S SUIT AGAINST DIRECTORS—continued.

- 6 (N. Y., 1882). If the receiver is one of the directors, such action may be maintained by the stockholders, or, when they are numerous, by one or more in behalf of all. (Ib.)
- 7 (N. Y., 1882). It is not necessary to allege in the complaint a direction from the Comptroller, or a demand upon him and a refusal, to direct the receiver to bring the action, or a refusal of the receiver to sue. (Ib.)
- 8 (N. Y., 1882). Such action may be brought in a State court. (Ib.)
- 9 (N. Y., 1882). The bank and the receiver, as such, are necessary parties defendant to such an action. (Ib.)

## OFFICERS, SET-OFF AGAINST LIABILITY.

- 1 (Miss. Sup., 1901). Where the vice-president and attorney of an insolvent bank was indebted to it on notes secured by mortgage, he was estopped to set up claims arising from a liability accruing against him as surety on an attachment bond, and for money which he borrowed on his personal credit and gave to the bank's cashier, as a set-off against his liability on the debt due the bank; and hence he was not entitled to maintain a bill to restrain the receiver of the bank from foreclosing the mortgage. (Chapman et al. v. Cutler, 3 Banking Cases, 280.)

## SURVIVAL OF ACTIONS.

*Survival of actions against director.*

- 1 (U. S. C. C., 1890). An act of Congress imposing a legal liability on the directors of a national bank for certain things which they may do which shall result in an injury to the bank, its stockholders, or creditors, and making them liable for the amount of the damage, is a remedial and not a penal statute, and therefore an action under it survives against the estate of a director. (Stephens v. Overstolz, 43 Fed. Rep., 465.)
- 2 (U. S. C. C., 1890). Where a bank director makes a wrongful loan of money from which loss occurs, it is no defense to an action by the receiver of the bank against the director's estate that the insolvency of the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver. (Ib.)
- 3 (U. S. C. C., 1886). Whether a suit against a director for negligent performance of his duties, as required by the statutes of the United States and the by-laws of the association, will survive against the executor or administrator depends upon State laws. (Witters, Receiver, v. Foster, Administrator, 26 Fed. Rep., 737.)
- 4 (U. S. C. C. A., 1904). An action by depositors against directors of an insolvent national bank to recover damages for breach of the directors' implied contract to see that the bank's assets were used in the manner prescribed by the national-bank act is an action on contract, and survives against representatives of deceased directors. (Boyd et al. v. Schneider et al., 131 Fed. Rep., 223.)

*When action against, for negligence abates.*

- 5 (U. S. C. C., 1886). Under the laws of Vermont an action against a director of a national bank for the negligent performance of duty in not requiring a bond from the cashier, and otherwise mismanaging the affairs of the bank, abates by his death, and can not be revived against his administrator. (Witters, Receiver, etc., v. Foster, Administrator, etc., 26 Fed. Rep., 737.)



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## GENERALLY.

*Offenses under section 5209.*

- 1 (U. S. C. C., 1882). The first clause of section 5209 of the Revised Statutes provides for three distinct offenses: First, embezzlement; second, abstraction; and, third, willful misapplication of the moneys, funds, or credits of the bank by any president, director, cashier, teller, clerk, or agent of any association organized as a national banking association. (*United States v. Lee*, 12 Fed. Rep., 816.)

*Not criminally liable for bad judgment.*

- 2 (U. S. C. C., 1887). Directors or the managing committee of a national bank may, in the honest exercise of official discretion, make loans or discounts for the actual or supposed benefit of the association, and, although the transaction may be injudicious and actually result in loss or damage to the bank, there is no criminal liability, so long as their acts are not in bad faith, for the purpose of personal gain or private advantage to the officials. (*United States v. Harper*, 33 Fed. Rep., 471.)

*Liable if not acting in good faith.*

- 3 (U. S. Sup. Ct., 1895). A bank president, not acting in good faith, has no right to permit overdrafts when he does not believe, and has no

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## GENERALLY—continued.

reasonable ground to believe, that the moneys can be repaid; and, if coupled with such wrongful act, the proof establishes that he intended by the transaction to injure and defraud the bank, the wrongful act becomes a crime. (*Coffin v. United States*, 162 U. S., 664.)

- 4 (U. S., 1885). The exercise of official discretion in good faith, without fraud, for the advantage or the supposed advantage of the association, is not punishable; but if official action be taken not in the exercise of discretion in bad faith, for personal advantage and with fraudulent intent, it is punishable. (*United States v. Fish*, 24 Fed. Rep., 585.)

*What held to be not a violation of section 5209.*

- 5 (U. S. Sup. Ct., 1882). It is not an offense against United States, under section 5540, Revised Statutes, nor a willful misapplication of money of bank, under section 5209, for president and director of bank to cause shares of its stock to be purchased with its money and held on trust for its benefit. (*United States v. Britton*, 108 U. S., 192.)
- 6 (U. S. Sup. Ct., 1882). It is not a willful misapplication of bank money by the president, under section 5209, for him to procure the discount by bank for his own benefit of an unsecured note on which both maker and indorser are insolvent to his knowledge unless it is charged that the note was discounted without the authority of the board of directors or was procured by fraud. (*Ib.*, 193.)
- 7 (U. S. Sup. Ct., 1882). Nor is president liable for a criminal violation of that section solely by reason of permitting a depositor who is largely indebted to bank to withdraw his deposits without first paying such indebtedness. (*Ib.*)
- 8 (U. S. Sup. Ct., 1882). The procuring by two or more directors of the declaration of a dividend at a time when there are no net profits to pay is not a willful misappropriation of money of bank within section 5204, Revised Statutes. (*Ib.*, 199.)
- 9 (U. S. Sup. Ct., 1882). Purchase of stock in violation of section 5201, Revised Statutes, made with intent to defraud, and by officers named in section 5209, is not punishable under latter section. (*United States v. Britton*, 107 U. S., 655.)
- 10 (U. S. Dist. Ct., 1889). The president of a national bank can not be convicted under Revised Statutes, section 5209, of the crime of making false entries in reports made by such bank to the Comptroller upon evidence that he signed and verified reports containing false entries where it is also shown that such entries were not made by him or by his direction. (*United States v. Booker*, 98 Fed. Rep., 291.)

*What held to be not a violation of section 5430.*

- 11 (U. S. Dist. Ct., 1901). Bills issued by a bank for circulation are not obligations or securities "engraved and printed after the similitude of an obligation and security issued under the authority of the United States," within the meaning of the Revised Statutes, section 5430, since they do not purport to be obligations or securities of the United States, and an indictment for a violation of said section does not charge an offense where it shows that the instruments referred to are such bank bills. (*United States v. Conners*, 111 Fed. Rep., 734.)

*Meaning of word willful.*

- 12 (U. S. Sup. Ct., 1894). The word "willful" in the act of Congress imposing a penalty on willful violation of the law respecting national banks implies a knowledge and purpose to do wrong. (*Potter v. United States*, 155 U. S., 438.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## EMBEZZLEMENT.

*What constitutes embezzlement.*

- 1 (U. S. C. C., 1898). To constitute embezzlement by an officer of funds of a national bank, within the meaning of Revised Statutes, section 5209, with intent to defraud the bank, there must be an unlawful conversion by the officer to his own use of funds intrusted to him, with intent to injure or defraud the bank, while abstraction or misapplication consists of the conversion, with a like intent, of funds not especially intrusted to his care. (U. S. v. Youtsey, 91 Fed. Rep., 864.)
- 2 (U. S. C. C., 1879). The word "embezzle," as found in the United States Revised Statutes, is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which may include some breach of confidence or trust. (United States v. Conant, 9 Cent. L. J., 129; 2 N. B. C., 148.)
- 3 (U. S. Dist. Ct.). Where the president, charged as a trustee with the administration of the funds of the bank in his hands, converts them to his own use without authority for so doing, he embezzles and abstracts them within the meaning of section 5209, Revised Statutes. (In re Van Campen, 2 Ben., 419.)
- 4 (U. S. Dist. Ct., 1904). The crime of embezzlement from a national bank by an officer, clerk, or agent within Rev. St. section 5209 [U. S. Comp. St. 1901, p. 3497], involves two general elements: First, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. (United States v. Breese, 131 Fed. Rep., 915.)
- 5 (U. S. Dist. Ct., 1904). The crime of embezzlement by an officer, clerk, or agent of a national bank, under Revised Statutes, section 5209 [U. S. Comp. St. 1901, p. 3497], necessarily includes the offenses of abstraction and willful misappropriation, but either of the latter offenses may be committed without embezzlement. (Ib.)
- 6 (U. S. Dist. Ct., 1904). The intent to injure or defraud, made by Revised Statutes, section 5209 [U. S. Comp. St. 1901, p. 3497], an element of the offenses of embezzlement, abstraction, or willful misapplication of funds by an officer, clerk, or agent of a national bank, need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was willfully and intentionally done. (Ib.)
- 7 (U. S. Dist. Ct., 1904). An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank in good faith, and in the supposed interest of the bank. (Ib.)

## ABSTRACTION OF FUNDS.

*What constitutes willful abstraction.*

- 1 (U. S. C. C., 1887). To constitute the offense of willful abstraction by an officer, defined by the statute, it is necessary that the money or funds of the association should be withdrawn by the officer or by his direction; that such taking or withdrawing should be without the knowledge or consent of the bank, or of its board of directors; that the money or funds so taken or withdrawn should be converted to the officer's own use or for the benefit and advantage of some person other than the association, and that this should be done with intent

## OFFICERS, CRIMINAL LIABILITY OF—(continued.)

## ABSTRACTION OF FUNDS—(continued.)

to injure and defraud the association. (*United States v. Harper*, 33 Fed. Rep., 471.)

- 2 (U. S. Dist. Ct., 1904). Abstraction, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], is the act of one who, being an officer, clerk, or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and, without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. (*United States v. Breese*, 131 Fed. Rep., 915.)

## WILLFUL MISAPPLICATION OF FUNDS.

*What constitutes willful misapplication of funds.*

- 1 (U. S. Sup. Ct., 1882). Willful misapplication under section 5209, Revised Statutes, means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore to constitute the offense of willful misapplication there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged. The purchase, for the use of the bank, of its own stock by its president when not necessary to secure a debt due the association is a maladministration of the affairs of the bank, but not a criminal misapplication of its funds. (*U. S. v. Britton*, 107 U. S., 655.)
- 2 (U. S. C. C., 1882). It was the intention of Congress to make criminal the misapplication and conversion of the funds of national banking associations without regard to whether or not the party so misapplying received any of the funds or other advantage, directly or indirectly. (*United States v. Lee*, 12 Fed. Rep., 816.)
- 3 (U. S. C. C., 1882). If it appears that the funds of the banking association have been abstracted or willfully misapplied by defendant, he is precluded from denying that it was done with unlawful intent. (*Ib.*)
- 4 (U. S. C. C., 1885). It is not necessary that the officer should personally misapply the funds of the association. He will be guilty as a principal offender though he merely procures or causes the misapplication. (*United States v. Fish*, 24 Fed. Rep., 585.)
- 5 (U. S. C. C., 1885). A loan in bad faith, with intent to defraud the association, is a willful misapplication within the meaning of the statute. (*Ib.*)
- 6 (U. S. C. C., 1887). To constitute the offense of a willful misapplication of the moneys, funds, or credits of the association within section 5209, Revised Statutes, it is not necessary that the person charged with the offense should have been previously in the actual possession of such moneys, funds, and credits under or by virtue of any trust, duty, or employment committed to him. Nor is it necessary to the commission of this offense that the officer making the willful misapplication should derive any personal benefit therefrom. When the funds or assets of the bank are unlawfully taken from its possession, and afterwards willfully misapplied by converting them to the use of any person other than the bank, with intent to injure and defraud, the offense as described in the statute is committed. (*United States v. Harper*, 33 Fed. Rep., 471.)
- 7 (U. S. C. C., 1887). This criminal act may be done directly and personally, or it may be done indirectly through the agency of another. If the officer charged with it has such control, direction, and power of management, by virtue of his relation to the bank, as to direct an application of its funds in such manner and under such circumstances as to constitute the offense of willful misapplication, and actually makes

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## WILLFUL MISAPPLICATION OF FUNDS—continued.

- such direction or causes such misapplication to be made, he is equally as guilty as if it was done by his own hands. (Ib.)
- 8 (U. S. C. C. A., 1897). An indictment under Revised Statutes, section 5209, against officers of a national bank and a depositor, charged willful misapplication of the funds of the bank, with intent to injure and defraud the bank. On the trial it appeared that the depositor made and deposited fictitious checks, which were credited to his account. *Held*, that it was necessary to show that some portion of the funds were withdrawn from the possession or control of the bank, or a conversion in some form was made thereof, so that the bank would be deprived of the benefit thereof. (Dow et al. v. United States, 82 Fed. Rep., 904.)
- 9 (U. S. C. C. A., 1897). The mere fact of payment by the officers of a national bank of a check which creates an overdraft does not necessarily constitute a fraudulent misapplication of the funds of the bank. (Ib.)
- 10 (U. S. C. C. A., 1900). Misapplication of assets of national bank by agent appointed to assist in liquidation is an offense, within Revised Statutes, section 5209. (Jewett v. United States, 100 Fed. Rep., 832.)
- 11 (U. S. C. C. A., 1900). President of national bank, appointed as agent to assist in liquidation, is liable to indictment for misapplication of assets as agent, under Revised Statutes, section 5209, though he is also a trustee for creditors. (Ib.)
- 12 (U. S. C. C. A., 1900). President of national bank, appointed to close its affairs in liquidation, is an agent, within meaning of Revised Statutes, section 5209, punishing misapplication of assets of national bank. (Ib.)
- 13 (U. S. C. C. A., 1900). Under indictment for misapplying assets of national bank, under Revised Statutes, section 5209, defendant may be convicted of misapplication of assets in his actual possession, since the word misapplication is the broader term and includes the offense of embezzlement. (Ib.)
- 14 (U. S. C. C. A., 1901). The willful misapplication of the funds of a national bank by an officer without the knowledge or consent of the bank, in violation of Revised Statutes, section 5209, is not changed, as to its criminal character, by the fact that the act subsequently became known to the officers of the bank, and that they impliedly consented thereto by taking no action in regard to it. (Rieger v. United States, 107 Fed. Rep., 916.)
- 15 (U. S. C. C. A., 1901). To constitute the offense of willful misapplication of the funds of a national bank, under Revised Statutes, section 5209, it is not essential that the money should be actually withdrawn from the bank, but the offense may be consummated by giving fraudulent credits and the transfer of the same in the usual way by means of checks. An indictment for such offense, alleged to have been committed by discounting a certain note, is sustained by proof that defendant, as president of the bank, without the knowledge or consent of the directors, discounted such note, which he knew to be worthless and insufficiently secured, crediting the proceeds on the books of the bank to the maker, subject to his check; that the maker drew a check for the amount in favor of a third person, who indorsed the same to defendant, and that defendant by means of such check paid a note held by the bank for which he was himself liable. (Ib.)
- 16 (U. S. Dist. Ct.). If, with intent to defraud the association, an officer allows a firm in which he is a member to overdraw its account, he will be guilty of misapplying the funds of the association. (In the matter of Van Campen, 2 Ben., 419.)
- 17 (U. S. Dist. Ct., 1904). Willful misapplication of the moneys, funds, or credits of a national bank, within Revised Statutes, section 5209

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## WILLFUL MISAPPLICATION OF FUNDS—continued.

[U. S. Comp. St., 1901, p. 3497], consists in their misapplication by an officer, clerk, or agent of the bank, made willfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime. (*United States v. Breese*, 131 Fed. Rep., 915.)

*Not misapplication to purchase stock of an association with its own funds, if stock is to be held in trust for it.*

- 18 (U. S. Sup. Ct., 1882). It is no violation of the provisions of section 5440, Revised Statutes, subjecting to penalties persons conspiring to commit an offense against the United States, and persons doing acts to effect the object of conspiracy; and no violation of section 5209, Revised Statutes, subjecting to punishment a president or a director of a national banking association who willfully misapplies the money, funds, or credits of the association, if the president and such a director conjointly cause shares in the capital stock of such association to be purchased with the money of the association, and held on trust for its benefit. (*United States v. Britton*, 108 U. S., 192.)

*When not misapplication to procure discount of note where both maker and indorser are insolvent.*

- 19 (U. S. Sup. Ct., 1882). It is not an offense under section 5209, Revised Statutes, which forbids the willful misapplication of the moneys of a national banking association by a president of the bank, for such officer to procure the discount by the bank of a note which is not well secured, and of which both maker and indorser are, to the knowledge of the president, insolvent when the note is discounted; and to apply the proceeds to his own use, unless it is charged that the note was discounted without the authority of the board of directors or was procured by fraud. (*United States v. Britton*, 108 U. S., 193.)

*Permitting a depositor indebted to the bank to withdraw his deposit not misapplication of funds.*

- 20 (U. S. Sup. Ct., 1882). Assuming that it was the duty of the president of a national banking association to prevent the withdrawal of deposits while the depositor is indebted to the association, he is, nevertheless, not liable for a criminal violation of section 5209, Revised Statutes, forbidding the willful misapplication of the funds of the bank, solely by reason of permitting a depositor who is largely indebted to the bank to withdraw his deposits without first paying his indebtedness to the bank. (*United States v. Britton*, 108 U. S., 193.)

*Payment of dividend when there are no net profits not misapplication of funds.*

- 21 (U. S. Sup. Ct., 1882). The procuring by two or more directors of a national banking association of a declaration of a dividend by the bank at the time when there are no net profits to pay it, is not a willful misappropriation of the money of the association within the provisions of section 5204, Revised Statutes; and an allegation of a conspiracy to do that act is not an allegation of a conspiracy to commit an offense against the United States. (*United States v. Britton*, 108 U. S., 199.)

## FALSE ENTRIES.

*On books of bank.*

- 1 (U. S. Sup. Ct., 1897). Where a transaction by a national-bank officer with intent to defraud is entered on a deposit slip, entry of the contents of such slip upon the books of the bank by him, or by his direction, is making a "false entry" within Revised Statutes, section 5209. (*Agnew v. United States*, 165 U. S., 36.)
- 2 (U. S. C. C., 1898). In a prosecution of an officer for making false entries in the books of a national bank and in the report made to the Comptroller, with intent to deceive the bank's directors and any agent of

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## FALSE ENTRIES—continued.

- the Comptroller, proof that the entries made were false, and known to be so by defendant; that they were made in the books, and afterwards carried into a report made by the bank to the Comptroller, and were calculated to deceive the Comptroller or his agent, raises a presumption that such was the intention in making them, though such presumption is not conclusive. (*United States v. Youtsey*, 91 Fed. Rep., 864.)
- 3 (U. S. C. C., 1898). Under the provisions of Revised Statutes, section 5209, making it a crime for an officer, clerk, or agent of a national bank to make any false entry in any book, report, or statement of the association, with intent to defraud or to deceive any officer of the bank, or any agent appointed to examine the affairs of the bank, an officer is chargeable for a false entry made by a clerk under his direction, the same as though he had made it in person. (*Ib.*)
  - 4 (U. S. C. C., 1898). Where defendant, as cashier of a national bank, discounted certain notes, credited the proceeds to the makers, procured the credit to be transferred to himself, and with it paid certain other notes then held by the bank, thus effecting a substitution of securities, the fact that he knew the makers of the notes taken up to be solvent, and the makers of the new notes to be insolvent, and the collateral security deposited therewith to be insufficient in value to pay them, raises a presumption that he intended by the transaction to injure or defraud the bank, though such presumption is not conclusive. (*Ib.*)
  - 5 (U. S. C. C., 1887). Any entry on the books of the bank which is intentionally made to represent what is not true or what does not exist, with intent either to deceive its officers or defraud the association, is a false entry within the meaning of the statute. (*United States v. Harper*, 33 Fed. Rep., 471.)
  - 6 (U. S. C. C., 1887). It may be made personally or by direction. (*Ib.*)
  - 7 (U. S. Dist. Ct., 1888). The erasure of figures already written in the books of a national bank and the substitution of other figures which falsify the state of the account constitute a "false entry" within the meaning of section 5209, Revised Statutes, by which it is declared to be a misdemeanor to make any "false entry in any book, report, or statement of the association, with intent to injure or defraud," etc. (*United States v. Crecelius*, 34 Fed. Rep., 30.)
  - 8 (U. S. C. C., 1889). A conviction can not be had under section 5209 where it appears that the officers alleged to have been deceived were accomplices in the speculation, to hide which the false entries were made. (*United States v. Means et al.*, 42 Fed. Rep., 599.)
  - 9 (U. S. C. C. A., 1897). If an overdraft is made and allowed under circumstances justifying it, or even under circumstances making it a fraud upon the bank, the entry of the transaction just as it occurred on the books of the bank is not a false entry, under section 5209, Revised Statutes. (*Dow et al. v. United States*, 82 Fed. Rep., 904.)
  - 10 (U. S. Dist. Ct., 1904). The entry on the books of a national bank by the cashier as a "cash item" of a check which actually entered into a transaction of the bank will not support an indictment of the cashier, under Revised Statutes, section 5209 (U. S. Comp. St. 1901, p. 3497), for making a "false entry," although it is further charged that he knew the check to be worthless and fraudulent and made the entry with intent to deceive, etc. The entry, being a truthful statement of the actual transaction, can not be converted into a false entry by any other fraudulent or unlawful act of the cashier. (*United States v. Young*, 128 Fed. Rep., 111.)

*In reports to Comptroller.*

- 1 (U. S. Sup. Ct., 1895). The assistant cashier of a bank is indictable under Revised Statutes, section 5209, for making a false entry in a report to the Comptroller, although he is not one of the officers authorized

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## FALSE ENTRIES—continued.

by section 5211 to make such a report; for he may be regarded as within the category of "clerk or agent," within the terms of section 5209, the penalty being affixed to the making of the false entry and not to the making or verification of the report. (*Cochran v. United States*, 157 U. S., 286.)

- 12 (U. S. Sup. Ct., 1895). A national bank officer can not be held criminally liable for verifying a report which he believes to be true but which is in fact false under Revised Statutes, section 5209, since that makes the intent to defraud a material element of the offense. (*Ib.*)
- 13 (U. S. C. C. A., 1899). The fact that a depositor in a national bank has given the bank an "overdraft note," which has not in fact been discounted, does not warrant the bank in reporting an overdraft by such depositor under the head of "loans and discounts." (*Bacon v. United States*, 97 Fed. Rep., 35; 2 B. C., 26.)
- 14 (U. S. C. C. A., 1899). To constitute the offense of making a false report of the condition of a national bank, within Revised Statutes, section 5209, it is not necessary that such report, when made by an officer of the bank to the Comptroller, should have been made in response to a call or request of the Comptroller. (*Ib.*)
- 15 (U. S. Dist. Ct., 1891). A report of condition of a national bank, whether called for by the Comptroller of the Currency or not, which is a report in the usual form made by an officer of the bank in his official capacity, if it contains a false entry made with intent to deceive, is within Revised Statutes, section 5209, which declares such false entries to be a misdemeanor. (*United States v. Hughitt*, 45 Fed. Rep., 47.)
- 16 (U. S. Dist. Ct., 1892). A "false entry" in a report by a national-bank officer or a director to Comptroller of the Currency within the meaning of section 5209 is not merely an incorrect entry made through inadvertent negligence or mistake, but is an entry known to the maker to be untrue and incorrect and by him intentionally entered while so knowing its false and untrue character. (*United States v. Graves*, 53 Fed. Rep., 634. See also *Graves v. U. S.*)
- 17 (U. S. Dist. Ct., 1892). It is not necessary to complete the offense of making a "false entry" in a report to the Comptroller of the Currency of the condition of a national bank, with intent to deceive or defraud, that any person shall have been in fact actually deceived or defrauded, for the making of such a "false entry" with the intent to deceive or defraud is sufficient. (*Ib.*)
- 18 (U. S. Dist. Ct., 1893). Under section 5209 of the national-bank act it is an indictable offense to make a false entry in a report to the Comptroller of the Currency, or to aid and abet the making of such an entry. (*United States v. French et al.*, 57 Fed. Rep., 382.)

*In statements to examiner.*

- 19 (U. S. C. C., 1898). If money is left with a national bank in a sack, with the express understanding that it is not to be mingled with the bank's funds, but the identical bills or coins are to be returned in the same condition, and this is done to make a showing of money to a bank examiner, as if it were the money of the bank, then the entry thereof on the books of the bank as a deposit is a false entry. (*United States v. Peters*, 87 Fed. Rep., 984.)

*In due course of business.*

- 20 (U. S. Dist. Ct., 1897). It is not a necessary ingredient of the offense of making a false entry in a report, under Revised Statutes, section 5209, that the report shall be one of those mentioned in sections 5211, 5212, or one which the bank is bound by law to make. It is sufficient if the report is one made in due course of business. (*United States v. Potter*, 56 Fed. Rep., 83, disapproved. *United States v. Booker*, 80 Fed. Rep., 376.)



## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## FALSE ENTRIES—continued.

*Principal and accessories.*

- 21 (U. S. Sup. Ct., 1895). The president and assistant cashier of a national bank are indictable as principals, under Revised Statutes, section 5209, for making a false entry in a report, although neither of them actually signed or attested the report. (*Cochran v. United States*, 157 U. S., 286.)
- 22 (U. S.). Where false entries are made by a clerk at the direction of the president, the latter is a principal.  
(U. S. C. C., 1885) *United States v. Fish*, 24 Fed. Rep., 585;  
(U. S. Dist. Ct.) In the matter of Van Campen, 2 Ben., 419.

*What is not a false entry under section 5209.*

- 23 (U. S. Dist. Ct., 1892). When false entries were made by a bookkeeper in a statement requested by a national-bank examiner, purporting to give the balance due to depositors, which statement it was the duty of the examiner to make and not the bookkeeper, an indictment for making "false entries in a statement of the association" will not be sustained. (*United States v. Ege*, 49 Fed. Rep., 852.)
- 24 (U. S. Dist. Ct., 1892). It is not a "false entry" to enter under heading of "Loans and discounts" items which, on books of the bank and for convenience of its officers, have been temporarily withdrawn from that heading, and which are, from day to day, carried on the books of the bank under heading of "Suspended loans" while awaiting action of directors as to same being withdrawn from character of loans and entered up as a loss on profit and loss account. (*United States v. Graves*, 53 Fed. Rep., 634. See also *Graves v. U. S.*)

*Limitations.*

- 25 (N. Mex. Sup., 1894). The provisions of section 1024, Revised Statutes, United States, relating to limitations of actions, apply to the offense of making false entries in books of national banks. (*United States v. Folsom*, 38 Pac. R., 70; 7 N. Mex., 532.)

## AIDERS AND ABETTERS.

*Persons who are not officers indictable under section 5209.*

- 1 (U. S. Sup. Ct., 1895). Revised Statutes, section 5209, relating to national banks, provides that officers or agents thereof who willfully misapply any of its moneys, or who make any false entry or reports with intent to injure or defraud it, or to deceive any officer of the bank, or any agent appointed to examine its affairs, and "every person" who, with like intent, aids or abets any officer or agent in any violation of the section, shall be guilty, etc. *Held*, that persons not officers or agents of a national bank may be aiders and abettors of the president of the bank in violation of such statute. (*Coffin v. United States*, 15 S. Ct., 394; 156 U. S., 432.)
- 2 (U. S. Sup. Ct., 1896). One who has an interest in a company, for the benefit of which the president of a national bank criminally misapplies its funds, may be guilty as an aider and abettor in such misapplication, although the president has no interest in or relation to him or to said company, and although he has no interest in the bank or with the president thereof of any kind. (*Coffin v. United States*, 16 S. Ct., 943; 162 U. S., 664.)
- 3 (U. S. Sup. Ct., 1896). It is not necessary to the guilt of aiders and abettors who are not officers of the bank that they should have a common purpose with the principal to subserve joint interests with him by the misapplication of the bank's funds. (*Ib.*)
- 4 (U. S. C. C., 1898). A depositor may knowingly overdraw his account and be innocent of any unlawful purpose; but if he does so for considerable amounts, without the knowledge and consent of the proper officials, and with a fraudulent intent that the moneys of the bank

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## AIDERS AND ABETTORS—continued.

shall be applied to their payment by the teller without the knowledge or consent of the proper officials, he is guilty. (*United States v. Kenney*, 90 Fed. Rep., 257.)

- 5 (U. S. C. C., 1898). An intent to injure or defraud a national bank, within the meaning of Revised Statutes, section 5209, does not necessarily involve malice or ill will toward the bank. It is sufficient that the unlawful intent is such as, if carried into execution, will necessarily or naturally injure or defraud the bank. (*Ib.*)
- 6 (U. S. C. C., 1898). If, at the time defendant drew checks upon a national bank, he knew or had reason to believe that they were to be fraudulently paid by the teller out of the funds of the bank, and not from any funds to which defendant could legitimately resort, he had a guilty intent; and it is immaterial that he intended finally to recompense the bank through successful operations in stocks or otherwise. (*Ib.*)
- 7 (U. S. C. C., 1898). If there was a fraudulent understanding between defendant and the paying teller that checks drawn by defendant in favor of a firm of stockbrokers were to be paid out of funds of the bank, when defendant had no funds or only insufficient funds to his credit, and that such checks were not to be charged in his account, but were to be fraudulently concealed until he should make deposits sufficient to meet them, defendant had a guilty intent to injure or defraud the bank. (*Ib.*)

*Death of principal before indictment no obstacle.*

- 8 (U. S. C. C. A., 1898). The death of the principal before indictment is no obstacle to the prosecution and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of Revised Statutes, section 5209, which makes such offense a misdemeanor. (*Gallot v. United States*, 87 Fed. Rep., 446.)

## WRONGFUL CERTIFICATION OF CHECK.

- 1 (U. S. C. C. A., 1898). In order to convict a national-bank officer of wrongfully certifying checks, it is not necessary to show that he had actual knowledge that the account against which the checks were drawn was not sufficient; it is enough if he willfully refrained from investigation in order to avoid knowledge. (*Spurr v. United States*, 87 Fed. Rep., 701.)

## PROSECUTIONS.

## INDICTMENT.

## IN GENERAL.

*Indictments for violations of section 5209.*

- 1 (U. S. Sup. Ct., 1896). An indictment against its president for defrauding a national bank, described the bank as the "National Granite State Bank," "carrying on a national banking business at the city of Exeter." The evidence showed that the authorized name of the bank was the "National Granite State Bank of Exeter." *Held*, that the variance was immaterial. (*Putnam v. United States*, 162 U. S., 687.)
- 2 (U. S. Sup. Ct., 1894). An indictment should charge the crime alleged to have been committed with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged; but it is not necessary in framing it to set up an impracticable standard of particularity, whereby the Government may be entrapped into making allegations which it would be impossible to prove. (*Evans v. United States*, 153 U. S., 584.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## IN GENERAL—continued.

- 3 (U. S. C. C., 1879). Section 1025 of the Revised Statutes provides: "No indictment \* \* \* shall be deemed insufficient \* \* \* in the matter of form only." *Held*, that anything that forms a part of the description of the crime is not a "matter of form." (United States v. Conant, 2 N. B. C., 148; 9 Central Law Journal, 129.)
- 4 (U. S. Dist. Ct., 1893). Embezzlement, abstraction, and willful misapplication of the moneys, funds, etc., of a national bank, as described in Revised Statutes, section 5209, constitute three separate crimes or offenses, which, under Revised Statutes, section 1024, may be joined in one indictment, but must be stated in separate counts. (United States v. Cadwallader, 59 Fed. Rep., 677.)
- 5 (U. S. C. C., 1897). An indictment against a defendant for the embezzlement and abstraction of the property of a national banking association is not demurrable because it charges the receipt of the property by him in different capacities, both as an officer and as an agent of the association. (United States v. Jewett, 84 Fed. Rep., 142. Affirmed, Jewett v. U. S., 100 Fed. Rep., 832.)
- 6 (U. S. C. C., 1897). An averment in an indictment against an officer and agent of a national banking association that the defendant "did steal, abstract, take, and carry away" property of the association does not charge two offenses. (Ib.)
- 7 (U. S. C. C., 1897). An allegation that defendant, an officer and agent of a national banking association, did secretly, in a manner and by particulars to the jurors unknown, willfully, unlawfully, and fraudulently convert to his own use, and misapply, from said association to himself, certain funds, sufficiently charges the offense of "willful misapplication" of property, under Revised Statutes, section 5209. (Ib.)
- 8 (U. S. C. C. A., 1901). Under Revised Statutes, section 5209, which makes it a criminal offense for an officer or agent of a national bank to do either of certain acts therein enumerated, "with intent in either case to injure or defraud the association," etc., such intent is an essential element of every offense therein specified, which must be charged in the indictment and proved. (McKnight v. United States, 111 Fed. Rep., 735.)

*For perjury for false statement under section 5211, Revised Statutes.*

- 9 (U. S. Sup. Ct., 1882). Indictment for perjury against officer for false statement under section 5211, Revised Statutes, is bad if, prior to the act of 1881, chapter 82, his oath verifying report was taken before notary appointed by a State. (United States v. Curtis, 107 U. S., 671.)

## WHEN EVIDENCE GIVEN BY BANK OFFICER OR OTHER WITNESS BEFORE GRAND JURY MAY BE USED AS BASIS FOR HIS INDICTMENT.

*Witnesses—Appearance before grand jury—Privilege.*

- 1 (U. S. C. C., 1902). Code of Criminal Procedure of New York, section 393, declaring that the defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him, applies only to "defendants," or persons against whom a charge has been brought, and is not the same as the constitutional provision declaring that no person shall be compelled to testify against himself, which provision includes not only defendants, but all witnesses. (United States v. Kimball et al., 117 Fed. Rep., 156.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

WHEN EVIDENCE GIVEN BY BANK OFFICER OR OTHER WITNESS BEFORE GRAND JURY MAY BE USED AS BASIS FOR HIS INDICTMENT—continued.

*Indictment—Use of evidence.*

- 2 (U. S. C. C., 1902). Where an investigation before a grand jury is in progress for the purpose of ascertaining whether a crime has been committed, not based on any complaint or formal accusation, evidence given in such investigation by persons subsequently indicted is not used elsewhere, in violation of Revised Statutes of the United States, section 860, declaring that any evidence voluntarily given by a witness can not be used against him in any criminal prosecution. (Ib.)
- 3 (U. S. C. C., 1902). That a person subsequently indicted was subpoenaed before the grand jury and compelled to take the usual oath was not an infringement of his constitutional right not to testify against himself, he not being able to claim his constitutional privilege until he had been sworn as a witness. (Ib.)

*Compulsion.*

- 4 (U. S. C. C., 1902). Where defendants were subpoenaed to appear before a grand jury and testify in an investigation concerning matters in which they were the principal actors, and before any complaint or accusation had been brought against them, and before appearing had time to consult counsel, and on appearing stated that they were desirous of an opportunity to testify, and made no claim of their constitutional privilege to refrain from testifying, they were not "compelled" to testify, within the constitutional prohibition declaring that no person shall be compelled to testify against himself, so as to invalidate an indictment subsequently found on evidence disclosed. (Ib.)
- 5 (U. S. C. C., 1902). Where a witness, on appearing before a Federal grand jury in response to a subpoena, stated that he had been advised not to answer any questions in regard to the subject under investigation, on the ground that his answers might tend to incriminate him, and he was thereupon fully informed that he could not be so compelled to testify, and he continued to answer questions or not, according to his free will, he could not thereafter claim, on a motion to quash an indictment against him, that his constitutional privilege was violated. (Ib.)
- 6 (U. S. Dist. Ct., 1897). An indictment should be quashed when it appears that defendant was compelled by subpoena to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation. (U. S. v. Edgerton, 80 Fed. Rep., 374.)

## EMBEZZLEMENT.

- 1 (U. S. Sup. Ct., 1891). An indictment on Revised Statutes, section 5209, is sufficient which avers that the defendant was president of the national banking association; that by virtue of his office he received and took into his possession certain bonds (described), the property of the association, and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. (Claasen v. United States, 142 U. S., 140.)
- 2 (U. S. Sup. Ct., 1891). In a criminal case a general judgment upon an indictment containing several counts and a verdict of guilty on each count can not be reversed on error if any count is good and is sufficient to support the judgment. (Ib.)
- 3 (U. S. C. C. A., 1899). Where the facts averred in an indictment against an officer of a national bank for embezzlement show that defendant wrongfully used the bank's money in his care and under his control for the purpose of bribing certain city officials in his own interest it

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## EMBEZZLEMENT—continued.

sufficiently avers an appropriation to his own use, and is not vitiated by further averments that there was an intent to wrongfully convert the money to the use of such officials, and that it was so converted. (*McKnight v. U. S.*, 97 Fed. Rep., 208.)

- 4 (U. S. C. C. A., 1901). An indictment under the national banking laws, which, following the words of the statute, charges the president of the bank with embezzling, abstracting, and misapplying moneys, funds, and credits of the bank at various times, need not specify how much was moneys, how much funds, and how much credits. (*Breese v. United States*, 106 Fed. Rep., 680.)
- 5 (U. S. C. C. A., 1898). An averment in an indictment under Revised Statutes, section 5209, for embezzlement by an officer of a national bank, that the money embezzled was lawful legal-tender money of the United States, is surplusage, and need not be proved. (*Porter v. United States*, 91 Fed. Rep., 494.)

## ABSTRACTION OF FUNDS.

- 1 (U. S. Sup. Ct., 1887). A form of indictment which sufficiently describes and identifies the crime of abstracting the funds of a national bank created by Revised Statutes, section 5209, sufficiently states the character and capacity of the bank. (*U. S. v. Northway*, 120 U. S., 327.)
- 2 (U. S. Sup. Ct., 1887). An indictment which charges in substance that the defendant was president and agent of a certain national bank theretofore duly organized and established and then existing and doing business, under the laws of the United States, and that, being such president and agent, he did then and there "willfully and unlawfully and with intent to injure the said national banking association, and without the knowledge and consent thereof, abstract and convert to his own use certain moneys and funds of the property of the said association of the amount and value," etc., sufficiently describes and identifies the crime of abstracting the funds of the bank created by Revised Statutes, section 5209. (*Ib.*)

## WILLFUL MISAPPLICATION OF FUNDS.

- 1 (U. S. Sup. Ct., 1887). In an indictment, under Revised Statutes, section 5209, for willfully misapplying the funds of a national bank, it is not necessary to charge that the moneys and funds alleged to have been misapplied had been previously intrusted to the defendant, since a willful and criminal misapplication of the funds of the association may be made by its officer or agent without having previously received them into his manual possession. (*U. S. v. Northway*, 120 U. S., 327.)
- 2 (U. S. Sup. Ct., 1887). In indictment charging president of a bank with aiding and abetting its cashier in the misapplication of its funds, it is not necessary to aver that he then and there knew that the person so aided and abetted was the cashier. (*Ib.*)
- 3 (U. S. Sup. Ct., 1882). The willful misapplication of the moneys and funds of the bank, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a willful misapplication for the use or benefit of the party charged, or of some person or company, other than the association, with intent to injure and defraud the association, or some other body corporate, or some natural person, and it must be charged in the indictment that such misapplication was so made. The counts in an indictment which charge the fraudulent purchase by the defendant, as president of a banking association, of certain shares of stock "in trust for the use of said association, and that said shares of stock were not purchased as aforesaid in order to prevent loss upon

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## WILLFUL MISAPPLICATION OF FUNDS—continued.

any debts theretofore contracted with said association in good faith," do not allege with sufficient certainty an offense under section 5209, (*United States v. Britton*, 107 U. S., 655.)

- 4 (U. S. Sup. Ct., 1895). The words "willfully misapplies" having no settled technical meaning, do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. (*Batchelor v. United States*, 156 U. S., 426.)
- 5 (U. S. C. C., 1893). An indictment against the president of a national bank alleging that he "unlawfully and willfully and with intent to injure and defraud the said association for the use, benefit, and advantage of himself did misapply certain of the money and funds of the association which he \* \* \* then and there, with the intent aforesaid, paid and caused to be paid" to certain persons named, was bad for failure to allege the fact that made such payment unlawful or criminal. (*United States v. Eno*, 56 Fed. Rep., 218.)
- 6 (U. S. C. C., 1893). It is not essential that such indictment should allege that the acts charged were done without the knowledge and assent of the directors of the association. (*Ib.*)
- 7 (U. S. C. C. A., 1900). Indictment charging one, as president, director, and agent of national bank, with willfully misapplying its assets, is not bad for duplicity. (*Jewett v. United States (C. C. A.)*, 100 Fed. Rep., 832.)
- 8 (U. S. C. C. A., 1900). Indictment for misapplying assets of national bank held not bad, for want of certainty, because it does not allege how funds were misapplied by defendant. (*Ib.*)
- 9 (U. S. C. C. A., 1901). Indictment for misapplying assets of national banking association need not allege that association is carrying on a banking business. (*Ib.*)
- 10 (U. S. C. C. A., 1901). In an indictment under Revised Statutes, section 5209, charging an officer of a national banking association with the willful misapplication of certain moneys, funds, and credits of the bank by using the same to discount an unsecured note of a person known to be insolvent, such note does not constitute the subject-matter of the offense, and need not be set out *hæc verba*. A description by giving the date and amount and the name of the maker, so as to advise the accused with reasonable certainty what note is intended, is sufficient. (*Rieger v. United States*, 107 Fed. Rep., 916.)
- 11 (U. S. C. C. A., 1901). It is not a substantial defect in such an indictment to aver that the misapplication of the funds was without the knowledge "and" consent of the bank, its directors, etc., instead of using the disjunctive form. (*Ib.*)
- 12 (U. S. C. C. A., 1901). An averment that defendant misapplied "certain moneys, funds, and credits" of the bank does not render the indictment bad for indefiniteness where it is followed by an explicit statement that the misapplication was committed by means of discounting a note, sufficiently described, which was known by him to be worthless. (*Ib.*)
- 13 (U. S. C. C. A., 1901). An averment that such note was "made and drawn" by a person designated by his full first and surnames is supported by proof that it was made by such person, although it is not shown whether it was signed with his full first name or by his initials. (*Ib.*)
- 14 (U. S. C. C. A., 1901). The indictment averred that the note was dated on the 8th day of December, 1894, and was due and payable "on the 11th day of April, A. D. 1894." The proof corresponded with the

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## WILLFUL MISAPPLICATION OF FUNDS—continued.

indictment as to date, but showed that the note was due on the 11th day of April, 1895. *Held*, that the mistake in the indictment was one so obvious that it could not have misled the accused to his prejudice, and that the variance was not fatal. The note not being the subject-matter of the offense, and the averment of the date of its maturity one which was immaterial and unnecessary to its identification, the allegation as to the day of maturity might be rejected as surplusage. (Ib.)

- 15 (U. S. C. C. A., 1901). An averment in the indictment that the misapplication of funds by the accused was for the benefit of himself "and other persons to the grand jurors aforesaid unknown" did not entitle the defendant to have the question whether the grand jury did in fact know, or should have known, the names of such other persons, submitted to the jury for the purpose of establishing a variance, since the failure to state such names, even if they might have been stated, could not have been prejudicial to defendant. (Ib.)
- 16 (U. S. C. C. A., 1901). Where an indictment, under Revised Statutes, section 5209, for a criminal misapplication of the funds of a national bank, fully describes the act constituting the alleged offense, so as to advise the accused of the particular transaction which is called in question, and the act is averred to have been done willfully and with intent to injure and defraud the bank, and without its knowledge or consent, it is sufficient to allege generally that it was done for the use, benefit, and advantage of the accused, or some company or person other than the bank, and a conversion of the fund or credit need not be averred. (Ib.)
- 17 (U. S. C. C., 1904). An indictment of an officer of a national bank, under Revised Statutes, section 5209 (U. S. Comp. St. 1901, p. 3497), for misapplication of funds, sufficiently alleges his possession of the funds by an averment that he was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in their control, management, and application. (U. S. v. Eastman, 132 Fed. Rep., 551.)
- 18 (U. S. C. C., 1904). An indictment of an officer of a national bank, under Revised Statutes, section 5209 (U. S. Comp. St. 1901, p. 3497), for misapplication of the funds or property of the association, sufficiently alleges the manner in which the misapplication was accomplished where it charges that, having access to the funds and properties of the bank, he willfully, unlawfully, fraudulently, and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. (Ib.)
- 19 (U. S. C. C., 1904). An indictment charging an officer of a national bank with misapplication of its funds, or with making false entries in its books, need not allege that the acts were done feloniously, where they are charged to have been done willfully and with intent to defraud the bank, and are such as are made misdemeanors by the statute. (Ib.)
- 20 (U. S. C. C., 1904). Under Revised Statutes, section 1024 (U. S. Comp. St. 1901, p. 720), providing that indictments shall not be deemed insufficient because of defects in form or other matters which do not affect the substantial rights of the accused, an indictment under section 5209 (U. S. Comp. St. 1901, p. 3497), charging a defendant, in different counts, with offenses against two different national banks, of each of which he was an officer, is not necessarily demurrable; but the propriety of such joinder in a given case is left to the discretion of the court, which may compel an election between the counts or direct separate trials. (Ib.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## FOR MAKING FALSE ENTRIES.

- 1 (U. S. Sup. Ct., 1882). An indictment under Revised Statutes, section 5209, requires the following averments:
  1. That the accused was the president or other officer of a national banking association, which was carrying on a banking business.
  2. That being such president or other officer, he made in a book, report, or statement of the association, describing it, a false entry, describing it. (Such entries need not be intelligible to persons not skilled in bookkeeping, and the fact that the attempt to deceive by making a false entry was not an adroit and skillful one does not relieve the act of its criminal character.)
  3. That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association. (It is not necessary that a bank examiner should have been appointed to examine the bank at the time the false entries were made, as the purpose of the statute is to punish all entries, no difference when made, if made with the intent to defraud the association or deceive the examiner.)
  4. Averments of time and place. (U. S. v. Britton, 107 U. S., 655.)
- 2 (U. S. Sup. Ct., 1882). In an indictment of an officer of a national bank, under section 5209, Revised Statutes, for making false entries in a book, report, or statement of such association, with an intent to injure and defraud the association, or deceive an agent appointed to examine the affairs of such association, it is not necessary to aver that the false entry was made "in an account of and in due course of the business of the bank." (Ib.)
- 3 (U. S. Sup. Ct., 1895). An indictment under Revised Statutes, section 5209, for making a false entry in a report to the Comptroller need not allege that such report was made by the banking association, or that it was actually verified by the oath or affirmation of the president or cashier, or attested by the directors, as required by section 5211; but it is sufficient to aver that defendant made such false entry "in a certain report of the condition of the First National Bank, \* \* \* made to the Comptroller of the Currency in accordance with the provisions" of Revised Statutes, section 5211. (Cochran v. United States, 15 S. Ct., 628; 157 U. S., 286.)
- 4 (U. S. C. C. A., 1900). An indictment charging a defendant as an officer of a national bank with having made a false statement in a report made to the Comptroller is not required to set out such report in full; but is sufficient if it identifies the report by its date and sets out the particular statement claimed to be false. (Dorsey v. United States, 101 Fed. Rep., 746.)
- 5 U. S. C. C., 1892). An indictment charging directors of a national banking association with making false entries in a report of condition to the Comptroller of the Currency can not be sustained under section 5209, for under section 5211 their sole duty in regard to such reports is to attest them by their signatures; and any entries therein by them would be mere spoliation and not "false" within the meaning of the section. (United States v. Potter, 56 Fed. Rep., 83.)
- 6 (U. S. C. C., 1892). The use in an indictment, under section 5209, of the words "then and there," in alleging that the defendant was president or director of such bank and made alleged false entries, is not uncertain or repugnant merely because in one place they may refer to the whole of a day and in another to only one instant of the day. (Ib.)
- 7 (U. S. C. C., 1892). The omission of the signs for dollars and cents in the recital of alleged false entries in reports and misnomer of reports are immaterial where reports are set out by their tenor in the indictment, so that these discrepancies are at the most "mere matter of form"



## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## FOR MAKING FALSE ENTRIES—continued.

within the meaning of Revised Statutes, section 1025, for which the indictment is not to be deemed insufficient. (Ib.)

- 8 (U. S. C. C., 1892). It is not necessary to allege specifically in such indictment that the reports were transmitted to the Comptroller of the Currency or that they were published. (Ib.)
- 9 (U. S. C. C., 1892). When indictment alleges that the false entries indicated that there was then in the paying teller's department of the bank certain amount in gold, legal tenders, and gold certificates, when in fact such amount was not there, it is not necessary that it should further allege that such amount was not then in other departments of the bank. (*United States v. Potter*, 56 Fed. Rep., 97.)
- 10 (U. S. C. C., 1892). In addition to the entries themselves, the indictment need set out the context only when it so modifies the entries as to be in presumption of law a part of them. (Ib.)
- 11 (U. S. C. C., 1892). The fact that the note teller's and paying teller's books, in which the president is charged with making the false entries, are usually kept by those officers without interference by the president does not invalidate indictment thereon, for the presumption that these acts were so far beyond the range of his duty as to be mere spoliations is at best one of fact and not of law. (Ib.)
- 12 (U. S. C. C., 1892). Counts charging false entries by the president in reports of condition of the bank, which allege that reports were made in conformity to the law, and then set them out by their tenor, are bad for their failure to allege specifically that the reports were verified and attested by the cashier. (Ib.)
- 13 (U. S. C. C., 1893). Where the entry whose tenor is set forth contains the words "See schedule," it is not a valid objection to the indictment that these words are not explained. (*United States v. French et al.*, 57 Fed. Rep., 382.)
- 14 (U. S. C. C., 1893). It is sufficient if the indictment allege the substance of the reports in question without setting them out in full. (Ib.)
- 15 (U. S. C. C., 1893). An allegation in an indictment under section 5209 that defendant "did make a certain false entry in a certain report of the association" will not be construed to mean that the entry was made after the report was completed and was, in fact, an alteration. (Ib.)
- 16 (U. S. C. C., 1893). The preparation and completion of the report, the making of the false entry therein, its verification, attestation, and delivery to the Comptroller may be considered as simultaneous, and there is no repugnance in failing to allege that any or all of these things occurred in consecutive order. (Ib.)
- 17 (U. S. C. C., 1893). Though the counts in an indictment under this section for aiding and abetting the cashier in making such false entries described defendant as "being then and there director" of the bank in question, it can not be held that they charge him in aiding and abetting in his official capacity. (Ib.)
- 18 (U. S. C. C., 1893). Counts in such indictment which charge defendants with procuring and counseling the false entry before the facts are valid, for such acts are covered by the clause of the section extending the penalty to anyone who "abets" an officer or agent in the acts prohibited. (Ib.)
- 19 (U. S. C. C. A., 1897). If, in an indictment under Revised Statutes, section 5209, it is the purpose of the Government to charge the making of false entries in the books of the bank, because of the receiving and crediting of checks drawn thereon by parties who had no funds there, the indictment should set forth a description of the checks, with an

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## FOR MAKING FALSE ENTRIES—continued.

avermment of the reasons why they were to be deemed false or valueless. (*Dow et al. v. United States*, 82 Fed. Rep., 904.)

- 20 (U. S. C. C., 1897). Averments in an indictment that the defendant was appointed agent in liquidation for a national banking association, and accepted that office, are not inconsistent with further averments that he afterwards acted as president, clerk, and director of the association. (*United States v. Jewett*, 84 Fed. Rep., 142. Affirmed in *Jewett v. U. S.*, 100 Fed. Rep., 832.)
- 21 (U. S. Dist. Ct., 1899). Where an officer of a national bank is charged with several offenses under Revised Statutes, section 5209, in making at different times false entries in the books, reports, or statements of the association, such offenses may be charged in different counts of the same indictment, as provided in Revised Statutes, section 1024, as "acts or transactions of the same class of crimes or offenses." (*United States v. Berry et al.*, 96 Fed. Rep., 842.)
- 22 (U. S. Dist. Ct., 1899). A count of an indictment charging one person with the commission of an offense as principal, and another as aiding and abetting its commission, is not open to the objection that it constitutes two separate counts, one against each defendant, because the formal closing, "contrary to the form of the statute," etc., is used at the close of each charge. The charges in such case are properly joined in one count, and the use of the formula at the close of the charge against the principal is surplusage, and will be disregarded. (*Ib.*)
- 23 (U. S. C. C. A., 1899). A count of an indictment charging that defendant, as president of a national banking association, caused a false entry, which is set out, to be made in the books of the bank, purporting to show that a customer had deposited a certain sum to his general credit, when in fact, as defendant well knew, no such deposit had been made, is not insufficient, in the absence of an application for a bill of particulars, because it does not allege the manner in which defendant "causes" the entry to be made. (*McKnight v. United States*, 97 Fed. Rep., 208.)

*Charge of intent.*

- 24 (U. S. C. C., 1892). An indictment against the president of a national bank, under section 5209, for making false entries in the books of the bank, charging that it was done "with intent to defraud said association and certain persons to the grand jurors unknown," is sufficient so far as concerns the allegations of intent. (*United States v. Potter*, 56 Fed. Rep., 97.)
- 25 (U. S. C. C. A., 1901). Under Revised Statutes, section 5209, which makes it a criminal offense for an officer or agent of a national bank to do either of certain acts therein enumerated, "with intent in either case to injure or defraud the association," etc., such intent is an essential element of every offense therein specified, which must be charged in the indictment and proved. (*McKnight v. United States*, 111 Fed. Rep., 735.)

*Conspiracy—Offense against United States—Violation of national banking act.*

- 26 (U. S. C. C. A., 1904). A conspiracy to violate Revised Statutes, section 5209 (U. S. Comp. St., 1901, p. 3497), by causing false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of a bank, is one to commit "an offense against the United States," within the meaning of section 5440 (U. S. Comp. St., 1901, p. 3676), and is indictable thereunder. (*Scott v. U. S.*, 130 Fed. Rep., 429.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## FOR MAKING FALSE ENTRIES—continued.

*Elements of offense—Act of one conspirator act of all.*

- 27 (U. S. C. C. A., 1904). An indictment, under Revised Statutes, section 5440 (U. S. Comp. St., 1901, p. 3676), against two defendants, charging them with a conspiracy to commit an offense against the United States by making certain false entries in the books of a national bank of which one of the defendants was an officer, in violation of Revised Statutes, section 5209 (U. S. Comp. St., 1901, p. 3497), is not bad because, in stating the details of the overt act committed by defendants, it is averred that the entries which were made in the books of the bank were made by the hand of the defendant, who was not an officer thereof; it being averred that both defendants were present and participated in the carrying out of the plan formed between them to make such entries. (Ib.)

## AIDERS AND ABETTERS.

- 1 (U. S. Sup. Ct., 1895). An indictment of persons for aiding and abetting a president of a national bank in misapplying its funds and making false entries in its books, with intent to defraud it, in violation of Revised Statutes, section 5209, need not specifically set out the act or acts by which the aiding and abetting were consummated. (*Coffin v. United States*, 15 S. Ct., 394; 156 U. S., 432.)
- 2 (U. S. Sup. Ct., 1895). An indictment of H. and other persons for violation of Revised Statutes, section 5209, averred that "said H., then and there being president" of a certain national bank, "by virtue of his said office as president aforesaid," "misapplied the funds," with intent to defraud, etc., and that such other persons did unlawfully, feloniously, "knowingly," and with intent to defraud, aid and abet the "said H., as aforesaid." *Held*, that the indictment averred that the aiders and abettors knew that H. was president of the bank at the time it is averred the acts were committed. (Ib.)
- 3 (U. S. Sup. Ct., 1895). Such indictment charged that H. did misapply the moneys of the bank with intent to convert a certain sum to the use of a specified company by causing it to be paid out of the moneys of the bank on a check drawn on the bank by such company, which check was then and there cashed and paid out of the bank's funds, which sum, and no part thereof, was such company entitled to withdraw from the bank, because it had no funds therein, and that said company was then and there insolvent, as H. well knew, whereby said sum became lost to the bank. *Held*, that the indictment averred the actual conversion of the sum misapplied. (Ib.)
- 4 (U. S. Sup. Ct., 1895). Where an indictment under Revised Statutes, section 5209, against a president of a national bank and others, for misapplying the funds of the bank, avers that such funds were misapplied with intent to convert the same to the use of a certain company, "and to other persons to the grand jury unknown," the Government need not prove want of knowledge in the grand jury as to such persons; and, in the absence of evidence on the subject, the verity of the averment will be presumed. (Ib.)
- 5 (U. S. Sup. Ct., 1896). Persons who have no official relation to a national bank may be indicted, under Revised Statutes, section 5209, as aiders and abettors of some officer of the bank in criminal misapplication of its funds, or in the making of false entries in its books. (*Coffin v. United States*, 16 S. Ct., 943; 162 U. S., 664.)
- 6 (U. S. Sup. Ct., 1896). If a violation of the statute is committed by an officer of the bank and by an outsider, the officer must be prosecuted as the principal, and the other can only be prosecuted, under the terms of the statute, as an aider and abettor. (Ib.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## AIDERS AND ABETTORS—continued.

- 7 (U. S. Sup. Ct., 1896). An indictment for aiding and abetting one H., the president of a bank, in the criminal misapplication of its funds, charged that, on a specified date, the said H. misapplied a named sum, by causing the same to be paid out on the checks of a company having no moneys in the bank. The aiding and abetting clause charged that the accused did "on [specifying the same date] aid and abet said H., as aforesaid, to wrongfully," etc., misapply the moneys of the bank, "to wit," specifying an identical sum. *Held* (overruling a contention that the words "said" and "as aforesaid" did not refer to the same moneys previously charged to have been misapplied by the president), that the language sufficiently connected the acts charged against the aider and abettor with the offense stated against the principal. (Ib.)
- 8 (U. S. Sup. Ct., 1896). An indictment for violating the national banking laws averred that the bank in question had been "heretofore" created and organized under the laws of the United States. *Held*, that even if it were assumed that the word should have been "therefore" in order to make it certain that the bank had been incorporated prior to the finding of the indictment, the result was only an imperfect statement of what the law implies to be true after verdict. (Ib.)
- 9 (U. S. Sup. Ct., 1896). *Coffin v. United States* (156 U. S., 432) affirmed on the following points: (1) That the offense of aiding or abetting an officer of a national bank in committing one or more of the offenses set forth in Revised Statutes, section 5209, may be committed by persons who are not officers or agents of the bank, and consequently it is not necessary to aver in an indictment against such an aider or abettor that he was an officer of the bank or occupied any specific relation to it when committing the offense; (2) that the plain and unmistakable statement of the indictment in that case and this, as a whole, is that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting were also done by assisting him in the official capacity in which alone it is charged he misapplied funds. (*Coffin v. United States*, 162 U. S., 664.)
- 10 (U. S. Sup. Ct., 1896). When the principal offender in the commission of the offense, made criminal by Revised Statutes, section 5209, and the aider and abettor were both actuated by the criminal intent specified in the statute, it is immaterial that the principal offender should be further charged in the indictment with having had other intents. (Ib.)
- 11 (U. S. C. C., 1886). An indictment charging defendants with aiding and abetting a director in a willful misapplication of the money of an association must state facts to show that there has been such misapplication committed by the director. (*United States v. Warner*, 26 Fed Rep., 616.)

## FOR WRONGFULLY CERTIFYING CHECK.

- 1 (U. S. Sup. Ct., 1894). In an indictment for a statutory offense, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offense, yet if such language is, according to the natural import of the words, fully descriptive of the offense, then ordinarily it is sufficient. (*Potter v. United States*, 155 U. S., 438.)
- 2 (U. S. Sup. Ct., 1894). A charge in an indictment that the defendant was president of a national bank, and as such on a day and at a place named unlawfully, knowingly, and willfully certified a certain check

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## INDICTMENT—continued.

## FOR WRONGFULLY CERTIFYING CHECK—continued.

(describing it) drawn upon the bank, and that the drawer did not then and there have on deposit with the bank an amount of money equal to the amount specified in the check, is a sufficient averment of the offense described in Rev. Stat., section 5208, the punishment for which is provided for in the act of July 12, 1882, c. 290, 22 Stat., 162, 166. (Ib.)

- 3 (U. S. Sup. Ct., 1894). As it is of the essence of the offense against those acts that the criminal act should have been done willfully, a person charged with illegally certifying a check is entitled to have submitted to the jury, on the question of "willful" wrongdoing, evidence of an agreement on the part of the officers of the bank that it should be treated as a loan from day to day, secured by ample collateral, and that for the check certified each day there was deposited each day an ample amount of cash. (Ib.)

## WHEN INDICTMENT SHOULD BE QUASHED.

- 1 (U. S. Dist. Ct., 1897). No person, other than a witness undergoing examination and the Government attorney, can be present at the sessions of a grand jury; and an indictment should be quashed where an expert witness remained in the jury room while another witness was being examined and the expert permitted to question him. (*United States v. Edgerton*, 80 Fed. Rep., 374.)
- 2 (U. S. Dist. Ct., 1897). An indictment should be quashed when it appears that defendant was compelled by subpoena to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation. (Ib.)
- 3 (U. S. C. C., 1898). Revised Statutes, section 1025, forbidding the court to quash an indictment for defect of form, makes it unnecessary, in criminal indictments, to repeat an averment contained in the first count, where subsequent counts refer back to the first, and are thereby rendered sufficiently explicit in stating the offense. (*United States v. Peters*, 87 Fed. Rep., 985.)

## MOTION IN ARREST.

- 1 (U. S. Dist. Ct., 1901). Judgment will not be arrested on motion for insufficiency of the indictment if any one of the counts therein is good. (*United States v. McClure*, 107 Fed. Rep., 268.)
- 2 (U. S. Dist. Ct., 1901). A count in an indictment for aiding the misapplication of national-bank funds in violation of Revised Statutes, section 5209, with ample allegations of fraudulent intent and purpose, distinctly charged embezzlement by the cashier of a national bank on many different days and times between May 24, 1897, and March 24, 1900, for the benefit and gain of defendant by a pretended discount of paper, contrary to the express direction of the directors, whereby defendant obtained \$140,000 of its moneys and funds, and converted the same to his own use. *Held*, good on motion in arrest, in view of section 1024, declaring the form of an indictment to be immaterial, provided the substance is there; the word "embezzlement," as used therein, showing a misapplication by the cashier of the property in his official possession, within the meaning of the statute, and the punishment prescribed being not so much for each offense, but so much for every officer or agent who commits such offenses, and every person who aids or abets, irrespective of the number of times. (Ib.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE.

## IN GENERAL.

- 1 (U. S. Sup. Ct., 1896). Conversations with a person took place in August, 1893. In December, 1893, he testified to them before the grand jury which found the indictment in this case. On the trial of this case his evidence before the grand jury was offered to refresh his memory as to those conversations. *Held*, that that evidence was not contemporaneous with the conversations, and would not support a reasonable probability that the memory of the witness, if impaired at the time of trial, was not equally so when his testimony was committed to writing; and that the evidence was therefore inadmissible for the purpose offered. (*Putnam v. United States*, 162 U. S., 687.)
- 2 (U. S. Sup. Ct., 1896). On the trial of a national-bank president for defrauding a bank, a witness for the Government was asked, on cross-examination, as to the amount of stock held by the president. This being objected to, the question was ruled out as not proper on cross-examination, the Government "not having opened up affirmatively the ownership of the stock." *Held*, that as the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination for the accused was not offered by him at any subsequent stage of the trial, no prejudicial error was committed by the ruling. (*Ib.*)
- 3 (U. S. Sup. Ct., 1897). On trial of the president of a bank for misapplication of its funds, the cashier, who has testified as a witness for defendant, may be asked, on cross-examination, whether he did not resign because of transactions of the defendant similar to that charged in the indictment. (*Agnew v. United States*, 165 U. S., 36.)
- 4 (U. S. Sup. Ct., 1897). The opinions of the financial world as to the rating or standing of the defendant when the acts complained of were committed were not admissible in evidence. (*Ib.*)
- 5 (U. S. C. C. A., 1899). A letter taken by some person from a box marked as containing private papers of the president of a national bank, and given to officers of the United States, is not, by reason of the manner in which it was obtained, inadmissible in evidence on behalf of the Government in the prosecution of the president for a violation of the national banking law. (*Bacon v. United States*, 97 Fed. Rep., 35; 2 B. C., 26.)
- 6 (U. S. C. C. A., 1899). Books of account of a national bank, in which the record of its daily business was kept, are admissible, without further proof, against an officer of the bank on trial for making false returns of its condition. (*Ib.*)
- 7 (U. S. C. C. A., 1899). Books of a national bank, obtained by the officers of the United States from the receivers of a State bank, which succeeded such national bank, are not inadmissible against an officer of such bank on trial for making false reports on the ground that they were obtained in violation of the constitutional provision against unreasonable searches and seizures. (*Ib.*)
- 8 (U. S. C. C. A., 1899). Prior false reports *held* admissible on the question of intent, on the trial of the president of a national bank for making a false report. (*Ib.*)
- 9 (U. S. C. C. A., 1899). The admission of expert testimony as to the meaning of certain entries in a report made by a national bank to the Comptroller against an officer of the bank on trial for making a false report of its condition is not prejudicial error, where it appears that such entries were correctly interpreted. (*Ib.*)
- 10 (U. S. C. C. A., 1900). Evidence to the effect that when a bank rediscounts notes it indorses them, and that a bank held certain notes which it rediscounted, is sufficient to establish the fact, when such notes have become lost or destroyed, that they were indorsed by the

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## IN GENERAL—continued.

bank, and to render admissible testimony of false entries in the books of the bank respecting such notes, made by direction of a defendant charged with having, as cashier, caused such entries to be made for the purpose of concealing the liability of the bank on account of such indorsement. (*Dorsey v. United States*, 101 Fed. Rep., 746.)

- 11 (U. S. C. C. A., 1901). A teller in a bank, testifying to checks on it, may refresh his memory by examining entries in its books, though some of them were not written by him. (*Breese v. United States*, 106 Fed. Rep., 680.)
- 12 (U. S. C. C. A., 1901). As evidence that overdrafts on a bank by its president were made with intent to abstract or misapply its funds, it may be shown that at the time of the overdrafts it was hopelessly insolvent, that this was due to its assets being notes of wholly irresponsible persons, and that these notes had been used by the president in connivance with the cashier, who was a director, and another director, to give him a fictitious credit. (Ib.)
- 13 (U. S. C. C. A., 1901). On the question of whether or not a bank president is guilty of abstracting or misapplying its moneys, it is immaterial that he drew out some of it for his children. (Ib.)
- 14 (U. S. C. C. A., 1901). The acts and intent of the president of a bank in obtaining money from it on worthless securities being such as to make him guilty of embezzlement, abstraction, or willful misapplication of its funds, it is immaterial that his acts were permitted, sanctioned, or ratified by the other officers of the bank, with knowledge of the facts. (Ib.)
- 15 (U. S. C. C. A., 1901). Though the president of a bank, in appropriating and converting its funds to his own use, does it in such a way that it can be easily discovered, and he is liable to a civil action, and does not abscond, or otherwise avoid the civil suit, he may be convicted of embezzlement. (Ib.)
- 16 (U. S. C. C. A., 1901). It is within the discretion of the judge to refuse to charge that there is no evidence in the case justifying a conviction. (Ib.)
- 17 (U. S. C. C. A., 1901). An expression of opinion by the judge that defendant is guilty is not error, he having cautioned the jury that they were the sole judges of the facts, and should not be governed by the opinion of the court. (Ib.)
- 18 (U. S. C. C. A., 1902). Under an indictment for embezzlement by an officer of a national bank, by causing money of the bank to be paid out to insolvent persons on their note, with intent to injure and defraud the bank, the insolvency of such persons is an important consideration for the jury, going to the question of fraudulent intent. (*McKnight v. United States*, 115 Fed. Rep., 972.)
- 19 (U. S. C. C. A., 1902). An averment, in an indictment charging an officer of a national bank with embezzlement by paying out money on a note which he knew to be worthless, with intent to injure and defraud the bank, that the transaction was without the knowledge or consent of the directors or the discount committee, need not be specifically proved, where the transaction which the evidence tends to prove was one to which it can not be presumed the directors or committee would consent; but in such case, if consent is relied on, it must be proved as matter of defense, and by evidence showing that it was given in good faith and with knowledge of the facts. (Ib.)
- 20 (U. S. C. C. A., 1897). Under such an indictment, where the issues involve the intent with which certain acts were done, the trial court is justified in giving a reasonably wide latitude to the introduction of evidence tending to show the relations of the parties, the mode in which

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## IN GENERAL—continued.

the business was carried on, and the knowledge which the officers had of the character of the operations carried on by the depositor. (*Dow et al. v. United States*, 82 Fed. Rep., 904.)

- 21 (U. S. C. C. A., 1898). Upon the trial of the president of a national bank for certifying checks without funds, evidence of speculations by the cashier with funds of the bank, with defendant's knowledge, is admissible for its bearing upon the right of the latter to rely upon the former's representations as to the state of the customers' accounts. (*Spurr v. United States*, 87 Fed. Rep., 701.)
- 22 (U. S. C. C. A., 1898). The period of time within which collateral transactions offered to show a guilty intent must have occurred is largely discretionary with the court. (*Ib.*)
- 23 (U. S. C. C. A., 1898). Upon the trial of a national-bank officer for official misconduct, evidence as to the defendant's reputation for honesty and integrity should be limited to such reputation down to the time of the failure of the bank. (*Ib.*)
- 24 (U. S. C. C. A., 1898). In general, where no attempt has been made to impeach the defendant's testimony, he may not add to the weight of his evidence by evidence of his general reputation for truthfulness. (*Ib.*)
- 25 (U. S. C. C., 1898). An indictment charging the making of false entries in the books of a national bank for the purpose of showing that on a certain date a county treasurer deposited \$10,000 "special," which was drawn out again a few days later. Evidence was offered by the Government to prove that no such deposit was made, and the treasurer himself was called by it, and testified that he had some recollection of having deposited a large sum about the time in question. Thereupon his books were produced, and after he had testified that he believed them to be correct he was permitted to testify as to the entries therein on the dates referred to. By these entries it did not appear that \$10,000 had been either deposited in bank or drawn from the cash on hand. The treasurer, however, then reiterated his former statement, and was even more positive that he had made the deposit. *Held*, that, in view thereof, there was no prejudicial error in admitting his testimony as to the book entries. (*United States v. Peters*, 87 Fed. Rep., 985.)
- 26 (U. S. C. C. A., 1901). In the prosecution of a bank teller for embezzling funds of the bank in violation of Revised Statutes, section 5209, the Comptroller's certificate of the organization of the bank and the extension of its powers and privileges was admissible. (*Tyler v. United States*, 106 Fed. Rep., 137.)
- 27 (U. S. C. C. A., 1901). Evidence as to how he conducted himself in the performance of his duty as teller was competent. (*Ib.*)
- 28 (U. S. C. C. A., 1901). A deposit slip introduced in evidence was delivered to accused by the clerk of the depositor at the time he deposited money and checks specified therein, and the deposit was made with the accused as teller; and the depositor's pass book showed the entry, in the handwriting of the accused, of \$274, the amount of the deposit. *Held*, that an entry by the accused of a deposit of the same amount in the ledger of the bank under a subsequent date, as made by a depositor of the same surname, but different initials, was not res inter alios, especially as the book was not in his charge or kept by him. (*Ib.*)
- 29 (Ill. Sup., 1902). On a prosecution under Ill. Starr & C. Ann. St., c. 38, section 168, providing for the punishment of an officer of a bank receiving deposits when it is insolvent, accused should have been allowed to testify as to his belief that the bank was solvent. (*Paulsen v. People*, 63 N. E. Rep., 144; 4 Banking Cases, 351; 195 Ill., 507.)



## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## IN GENERAL—continued.

30 (Ill. Sup., 1902). On a prosecution under Ill. Starr & C. Ann. St., c. 38, section 168, providing for the punishment of an officer of a bank receiving deposits when it is insolvent, it was harmless error not to permit accused to testify as to his belief of its solvency, the testimony being overwhelming to the effect that it was insolvent to his knowledge. (Ib.)

*Confessions—Corroboration as to corpus delicti.*

31 (U. S. C. C. A., 1902). A defendant in a criminal case can not be convicted on his extra-judicial confession unless it is corroborated in a material and substantial manner by evidence aliunde as to the corpus delicti. Such evidence, however, need not be such as to alone establish that fact beyond a reasonable doubt, but it is sufficient if, when considered in connection with the confession, it satisfies the jury beyond a reasonable doubt that the offense was committed, and that the defendant committed it. (Flower v. U. S., 116 Fed. Rep., 241.)

*Evidence considered.*

32 (U. S. C. C. A., 1902). Evidence considered, and held sufficient, when considered in connection with defendant's confession, made to different persons, to sustain a verdict finding him guilty of embezzlement of the funds of a national bank of which he was paying teller. (Ib.)

*Witnesses—Cross-examination—Scope.*

33 (U. S. C. C. A., 1903). It is the general rule in the Federal courts that a party has no right to cross-examine a witness, without leave of court, as to any facts or circumstances not connected with matters stated in his direct examination. (McKnight v. U. S., 122 Fed. Rep., 926.)

*Indictment for embezzlement as bank officer—Proof of official capacity.*

34 (U. S. C. C. A., 1903). An entry in a book identified as the minute book of a national bank, showing the election of defendant as a director and as president of the bank, together with evidence that he acted as such, is sufficient, prima facie, to support an averment that he was president of the bank in an indictment charging him with embezzlement as such officer. (Ib.)

*Secondary evidence of documents—Demand on defendant to produce.*

35 (U. S. C. C. A., 1903). In a criminal case it is not necessary to prove notice or demand to produce an incriminating document, shown by the testimony of a witness to have been in possession of the defendant, as a foundation for the introduction of secondary evidence of its contents, since the defendant could not be compelled to produce it to be used as evidence against himself; but the requiring of such demand and the making of it in open court, where the jury had been first excused, was not error prejudicial to the defendant, nor was a statement by the court to the district attorney in the presence of the jury that he could introduce a copy of the document, "provided you gave the necessary notice," where it was not stated what notice was meant, nor to whom. (Ib.)

*Same—Constitutional rights of defendant—Demand for production of incriminating documents.*

36 (U. S. C. C. A., 1902). To permit a demand to be made on the defendant in a criminal case, in the presence of the jury, to produce a paper or document containing incriminating evidence against him, is a violation of the immunity secured to him by the fifth amendment to the Constitution, providing that no person in any criminal case shall be compelled to be a witness against himself, even though no order for the production of the paper is made, and the demand is made solely

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## IN GENERAL—continued.

because of its supposed necessity to authorize the introduction of secondary evidence. (*McKnight v. U. S.*, 115 Fed. Rep., 972.)

*Same—Remarks of court or counsel.—Reference to defendant's rights to testify.*

- 37 (U. S. C. C. A., 1902). It is prejudicial error for the court or counsel to call to the attention of the jury, in a criminal case, in any manner, the right of the defendant, under the statute, to testify in his own behalf; and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify. Such comment is not rendered harmless by the fact that the defendant does afterwards testify, since it virtually compels him to do so to avoid unfavorable inferences by the jury. (*Ib.*)

*Burden of proof—When successfully met.*

- 38 (U. S. Dist. Ct., 1904). While the burden of proof rests upon the prosecution in a criminal case from the beginning to the end of the trial, it is successfully met whenever, from all the evidence introduced in the case, and taking into consideration the presumption of innocence in favor of the accused, the jury are satisfied of his guilt beyond a reasonable doubt. (*U. S. v. Breese*, 131 Fed. Rep., 915.)

## INTENT AS AN ELEMENT IN FALSE ENTRIES, EVIDENCE OF.

- 1 (U. S. C. C. A., 1899). In prosecutions for making false reports to the Comptroller of the condition of a national bank, a preceding report of the condition of the bank to the Comptroller of the Currency, attested by defendant as its president, and containing a false entry reporting an overdraft as so much cash on hand, was admissible to show with what intent any false entry found in the false report alleged in the indictment was made by the defendant, as the bank examiner who discovered such false entry testified that he had called defendant's attention to the error within four months preceding the making of the false report alleged in the indictment. (*Bacon v. United States*, 2 Banking Cases, 27; 97 Fed. Rep., 35.)
- 2 (U. S. Dist. Ct., 1897). Under Revised Statutes, section 5209, prohibiting "every \* \* \* cashier \* \* \* of any" national bank from making "any false entry in any \* \* \* report \* \* \* with intent to injure or defraud," etc., and prescribing a like penalty for "every person who, with like intent, aids or abets any officer," etc., the intent is a material ingredient under each clause; and therefore an indictment which, after duly charging the act and intent in respect to the cashier, merely charges another person with aiding and abetting him to make said false entries "in manner and form as aforesaid," is open to demurrer. (*United States v. Berry et al.*, 85 Fed. Rep., 208.)
- 3 (U. S. C. C., 1893). The "false entry" in the books or reports of a bank, which is punishable under Revised Statutes, section 5209, is an entry that is knowingly and intentionally false when made. It is not the purpose of the statute to punish an officer who, through honest mistake, makes an entry in the books or reports of the bank which he believes to be true, when it is in fact false. (*United States v. Allis*, 73 Fed. Rep., 165.)
- 4 (U. S. C. C., 1893). If a president or cashier makes a false entry in a report of the condition of the bank to the Comptroller of the Currency, the jury are authorized to presume, from the false entry itself, in the absence of any explanation or of any other testimony, that he knew it to be false. This presumption results from the fact that it

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## INTENT AS AN ELEMENT IN FALSE ENTRIES, EVIDENCE OF—continued.

is the duty of the officer who verifies the report to know the condition of the bank, and if the report is false there is a 'prima facie' presumption that he knew it. (Ib.)

- 5 (U. S. C. C., 1893). A false entry, either in the books of the bank or in a report of its condition, is punishable only when the jury find that it was made by the defendant or by his direction, with the intent either (1) to injure or defraud the bank, or some other corporation, or some firm or person; or (2) to deceive some officer of the bank; or (3) to deceive some agent appointed or thereafter to be appointed to examine the affairs of the bank. If any one of these intents is present the offense is complete. (Ib.)
- 6 (U. S. C. C., 1893). Where an entry in the books or in a report of the bank's condition is in fact false, the jury are authorized to infer, from the false entry itself, an intent of the defendant to injure or defraud the bank, or some other corporation or individual, or to deceive some officer of the association, or agent appointed to examine into the condition of the bank, if such would be the natural and probable consequence of the false entry. (Ib.)
- 7 (U. S. C. C., 1893). A false entry made in the books or reports of a bank by a clerk, bookkeeper, or other subordinate employee, by the command or direction of the president of the bank, is a false entry made by the president, and he is liable to punishment for it if he gives the direction knowing the entry to be false, or with the intent to defraud, deceive, etc. (Ib.)
- 8 (U. S. C. C., 1893). If a false entry in the books or reports is made with a criminal intent, it is no defense that another false entry is also made, which offsets the former entry with a like intent: but changes of this character are not as strong evidence of an intent to injure or defraud the bank, or to deceive its officers or examiners, as false entries which enable the officer making them to withdraw the funds of the bank without consideration. (Ib.)
- 9 (U. S. C. C., 1893). Every overdraft, whether made by previous arrangement or not, whether secured or not, and whether drawing interest or not, is a loan, and is required by the law and the rules prescribed by the Comptroller to be listed and reported as an overdraft. It is, therefore, no defense to a charge of false entries in respect to overdrafts that they had been arranged for or secured, or that interest was to be paid upon them by agreement, if such false entries were made with a criminal intent; but in determining the intent the jury may consider the testimony of defendant that he considered the overdrafts as loans. (Ib.)
- 10 (U. S. C. C. A., 1899). Under an indictment based upon Revised Statutes, section 5209, charging an officer of a national bank with having made false entries in its books with the intent to deceive the officers and directors of the bank and any agent appointed by the Comptroller to examine the affairs of the bank and to injure and defraud the association, it is sufficient to prove the wrongful intent in either particular charged. (*McKnight v. United States*, 97 Fed. Rep., 208.)
- 11 (U. S. C. C. A., 1900). On the trial of a defendant upon charges of having, while an officer of a national bank, unlawfully abstracted money from such bank and having made false entries in report made to the Comptroller, evidence that, at about the same time as the acts charged, the defendant made other reports to the Comptroller, containing similar false statements, and that he also procured the execution by an irresponsible third party of a note without consideration, which he discounted on behalf of the bank and appropriated the proceeds, is admissible on the question of intent, as showing that

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## EVIDENCE—Continued.

## INTENT AS AN ELEMENT IN FALSE ENTRIES, EVIDENCE OF—continued.

defendant had acted in bad faith toward the bank in such transactions, although such acts are not counted upon in the indictment. (*Dorsey v. United States*, 101 Fed. Rep., 746.)

- 12 (U. S. Dist. Ct., 1904). On the trial of an officer of a national bank for embezzlement, abstraction, and misapplication of funds, under Revised Statutes, 5209, which makes an intent to injure or defraud an element of either offense, evidence of other transactions by defendant of similar character is admissible, but may be considered by the jury only on the question of the knowledge and intent of the accused when he committed the acts charged in the indictment. (*United States v. Breese*, 131 Fed. Rep., 915.)
- 13 (N. Mex. Sup., 1894). The jury are warranted in finding that false entries were made with guilty intent from the testimony of defendant that the said entries were made under his direction, with the knowledge that they were not transactions of the day on which they were entered in the books of the bank. (*United States v. Folsom*, 38 P., 70; 7 N. Mex., 532.)

## TRIAL AND ITS INCIDENTS.

## JURISDICTION.

- 1 (U. S. Sup. Ct., 1896). When an offense against the provisions of Revised Statutes, section 5209, is begun in one State and completed in another, the United States court in the latter State has jurisdiction over the prosecution of the offender. (*Putnam v. United States*, 162 U. S., 687.)

## INSUFFICIENT DEFENSES.

- 1 (U. S. C. C.). It is no defense to a charge of embezzlement, abstraction, or misapplication of the funds of a national banking association that the funds were used with the knowledge and consent of the president and some of the directors. The intent to defraud is to be conclusively presumed from the commission of the offense. (*United States v. Taintor*, 11 Blatch., 374.)
- 2 (U. S. Dist. Ct., 1880). In an indictment of an officer of a national bank under section 5209, Revised Statutes, for making false entries in a report to the Comptroller of the Currency, it is no defense that such entries were made by a clerk and verified by the officer without actual knowledge of their truth, since it was his duty to inform himself. (*United States v. Allen*, 47 Fed. Rep., 696.)
- 3 (U. S. C. C., 1893). If the president of a bank makes or causes to be made false entries in its books, or in reports to the Comptroller, with the intent to deceive or defraud, etc., it is no defense that he struggled to save the bank from failure and to provide money to pay its depositors by sacrificing his own property and borrowing money from others. (*United States v. Allis*, 73 Fed. Rep., 165.)
- 4 (U. S. C. C. A., 1898). Where, during the trial, a juror becomes disqualified, and the court adjudges a mistrial, a plea of former jeopardy is not good on a second trial, even though all parties were willing to proceed with eleven jurors. (*Gardes v. United States; Girault v. Same*, 87 Fed. Rep., 172.)
- 5 (U. S. C. C. A., 1898). Where defendants have been arraigned, and have waived reading of the indictment, they may not subsequently complain if the whole indictment is not read at the trial, but such parts of it are read and such explanations made of the other parts as may give the jury the clearest comprehension of it. (*Ib.*)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## INSUFFICIENT DEFENSES—continued.

- 6 (U. S. C. C., 1898). A plea of former jeopardy set up certain prior proceedings had in the same court under the same indictment. Counsel for the Government having objected thereto, the court treated his objection as a demurrer to its sufficiency in law, and thereupon overruled the plea. The trial then went on, without objection by defendant to the subsequent proceedings. *Held*, that there was no error in thus proceeding with the cause without first setting down the plea for trial, as the only question arising thereon was one of law, which was finally disposed of by the former ruling. (*United States v. Peters*, 87 Fed. Rep., 985.)

## INSTRUCTIONS TO JURY.

- 1 (U. S. Sup. Ct., 1896). On the trial of persons charged with aiding and abetting the president of a national bank in criminally misapplying its funds and making false entries in its books, the court charged that if the jury were satisfied that the president did knowingly and purposely make, or cause to be made, the false entries as charged, they could not find the defendants guilty as aiders and abettors, unless they were satisfied that defendants, "with like intent, unlawfully and knowingly did or said something showing their consent to, and participation in, the unlawful and criminal acts" of the said president, "and contributing to their execution." *Held*, that this language was not open to the objection that the expression "unlawful and criminal acts" might have been understood as relating to unlawful and criminal acts of the president generally. (*Coffin v. United States*, 162 U. S., 664.)
- 2 (U. S. Sup. Ct., 1896). Instructions requested may be properly refused when fully covered by the general charge of the court. (*Ib.*)
- 3 (U. S. Sup. Ct., 1896). When the charge, as a whole, correctly conveys to the jury the rule by which they are to determine, from all the evidence, the question of intent, there is no error in refusing the request of the defendant to single out the absence of one of the several possible motives for the commission of the offense, and instruct the jury as to the weight to be given to this particular fact independent of the other proof in the case. (*Ib.*)
- 4 (U. S. Sup. Ct., 1896). The refusal to give, when requested, a correct legal proposition does not constitute error, unless there be evidence rendering the legal theory applicable to the case. (*Ib.*)
- 5 (U. S. Sup. Ct., 1896). When it is impossible to determine whether there was evidence tending to show a state of facts adequate to make a refused instruction pertinent, and there is nothing else in the bill of exceptions to which the stated principle could apply, there is no error in refusing it. (*Ib.*)
- 6 (U. S. Sup. Ct., 1897). When an officer of a national bank, indicted under Revised Statutes, section 5209, for making false entries in the report of the condition of such bank in respect to amounts of overdrafts and of loans and discounts, has testified that certain overdrafts, in respect to which the depositors had consulted the bank officers and obtained permission to overdraw, were treated by the officers and directors of the bank as temporary loans, and were reported by him among loans, and not among overdrafts, in the belief that they might properly be so reported, it is error to charge the jury that the defendant was required by law to place, under the heading "Overdrafts" in the report, all sums drawn out by depositors in excess of their deposits, and that the transfer of any such sums to the heading "Loans and discounts" was the making of a false entry, since such charge takes from the jury the right to consider, upon the question

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## INSTRUCTIONS TO JURY—continued.

- of intent, the explanation given by the defendant, while, if they believed such explanation, and that the defendant acted in good faith, the entries were not false within the meaning of the statute. Mr. Justice Harlan dissenting. (*Graves v. United States*, 165 U. S., 323.)
- 7 (U. S. Sup. Ct., 1897). A charge to the effect that if defendant, a bank president, purchased bonds which were worthless, or of but little value, placed them among the assets of the bank at a greatly exaggerated value, and had such exaggerated value placed to his own credit, these facts create a presumption of an intent to defraud the bank, which "throws the burden of proof upon the defendant," and that evidence to overcome the presumption "must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent," is not error where the character of such evidence and the nature of a reasonable doubt are sufficiently explained in other portions of the charge. (*Agnew v. United States*, 165 U. S., 36.)
  - 8 (U. S. Sup. Ct., 1897). A charge that if the defendant "either embezzled or willfully misapplied" the funds or credits of the bank, "whereby, as a necessary, natural, or legitimate consequence, its capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed," is correct. (Ib.)
  - 9 (U. S. Sup. Ct., 1897). It is not reversible error to refuse to charge that if defendant used the proceeds of a check belonging to the bank, and which he had caused to be placed to his credit, in the payment of a debt of the bank, the jury must find that he did not fraudulently embezzle the amount, especially where defendant's explanation of the transaction is satisfactory. (Ib.)
  - 10 (U. S. C. C. A., 1900). It is not error to refuse a special instruction that defendant was not guilty of making false entries if he made them in good faith, when in its general charge the court states that the defendant could not be convicted unless the entries were "knowingly and intentionally false when made" and were made with intent to defraud and deceive, and that if the jury found that the defendant honestly believed, and had good reason to believe, that the entries were correct, he would not be guilty. (*Dorsey v. United States*, 101 Fed. Rep., 746.)
  - 11 (U. S. C. C. A., 1900). Where a defendant was charged in several counts with making false entries in the books of a national bank, an instruction to find for defendant on such counts was properly refused where there was sufficient evidence to go to the jury on any one of them. (Ib.)
  - 12 (U. S. C. C. A., 1901). An instruction on a trial for violating the banking law that "in his opinion it was the duty of the jury to convict the defendant," was ground for a new trial, as calculated to mislead the jury, who would, perhaps, construe the language as a direction on the part of the court. (*Breese v. United States*, 108 Fed. Rep., 804.)
  - 13 (U. S. C. C. A., 1897). In such a case, a statement by the court to the jury that under a State statute it is made a misdemeanor to draw a check on a bank where there are no funds to meet it, tends to mislead the jury, and constitutes error. (*Dow et al. v. United States*, 82 Fed. Rep., 904.)
  - 14 (U. S. C. C. A., 1898). In a prosecution against a national bank president for unlawfully certifying checks, it is not error to instruct the jury that the presumption is that he had knowledge of the condition

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## INSTRUCTIONS TO JURY—continued.

of the account upon which the checks were drawn, where the same instruction cautions them that such presumption may be rebutted by evidence that the defendant did not in fact have such knowledge. (*Spurr v. United States*, 87 Fed. Rep., 701.)

- 15 (U. S. C. C., 1898). If the jury be charged that a false entry on the books of a national bank alone gives rise to the presumption, not only that the entry was made with criminal intent, but also with knowledge of its falsity, but elsewhere in the charge it was said that a false entry must be known to be false and designed and intended to deceive, the charge is not erroneous. (*United States v. Peters*, 87 Fed. Rep., 985.)
- 16 (U. S. C. C., 1898). Where the court has several times stated to the jury that the indictment charges the making of false entries in the books of the bank with intent to deceive the examiner, and the making of false reports with intent to deceive the Comptroller, it is not misleading to thereafter say that defendant is guilty if he made such false entries and report "with the intent mentioned in the statute," although the statute mentions several other intents. (Ib.)
- 17 (U. S. C. C. A., 1901). A jury returned into court and requested the judge to reread the portion of his instructions relating to the particular charge made in one count of the indictment. The judge did so, and the attorney for defendant then requested that the portion of the charge relating to the presumption of innocence and reasonable doubt be also reread. This request the court refused, after having asked the jury if they desired to have such parts reread, and received a reply, through the foreman, that they did not. *Held*, that such action by the court was not error. (*Rieger v. United States*, 107 Fed. Rep., 916.)
- 18 (U. S. C. C. A., 1901). The refusal of the court in a criminal case to instruct the jury, as requested, that they might find the defendant guilty or innocent of some of the offenses charged in the indictment, and return a verdict of disagreement as to others, can not be held error prejudicial to the defendant, where he was found guilty upon one count and acquitted upon the others. It must be presumed that the verdict would have been the same had such instruction been given. (Ib.)
- 19 (U. S. C. C. A., 1901). Where the court, in a prosecution under Revised Statutes, section 5209, for embezzlement by an officer of a national bank, refused to charge, as requested, that the defendant could not be convicted unless the jury found that the acts of embezzlement were committed with intent to injure or defraud the bank, as charged in the indictment, but charged that the averment of such intent was surplusage, such action was reversible error, notwithstanding it defined embezzlement in the charge as the fraudulent appropriation by defendant of funds of the bank to his own use. (*McKnight v. United States*, 111 Fed. Rep., 735.)
- 20 (U. S. C. C. A., 1902). A charge in a criminal case, in which intent was an essential ingredient of the offense, was erroneous, where, after correctly stating that the burden rested upon the Government to prove such intent beyond a reasonable doubt, but that it might be inferred from the acts of the defendant, who was presumed to have intended the natural and probable consequences of his acts, it was further stated that, if the acts proven were such as to raise an inference of guilty intent, the burden was thrown upon defendant to rebut such inference by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no guilty intent; and the error can not be held harmless where the general instruction that the burden of proof rested on the Government, and continued

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## INSTRUCTIONS TO JURY—continued.

throughout the case, was qualified by the words "subject to what will be thereafter said upon the question of proof of intent." (*McKnight v. United States*, 115 Fed. Rep., 972.)

- 21 (U. S. Dist. Ct., 1902). In a prosecution, under Revised Statutes, section 5209, against an officer or clerk of a national bank for embezzlement or the making of false entries, with intent to injure or defraud the bank or to deceive, if the acts charged are proved the intent must be inferred therefrom; and, while such inference or presumption is not conclusive, it throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy the jury, beyond a reasonable doubt, that there was no such guilty intent in the transaction, though, if the use of the words "beyond a reasonable doubt" was technically erroneous, such use was not prejudicial to the case, when the charge is viewed as a whole and in connection with the uncontradicted evidence of the acts which constituted the *prima facie* case. (*United States v. German*, 115 Fed. Rep., 987.)

## PRACTICE, JURY.

- 1 (U. S. Sup. Ct., 1891). When it is made to appear to the court during the trial of a criminal case that, either by reason of facts existing when the jurors were sworn, but not then disclosed and known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors, or any of them, are subject to such bias or prejudice as not to stand impartial between the Government and the accused, the jury may be discharged and the defendant put on trial by another jury; and the defendant is not thereby twice put in jeopardy, within the meaning of the fifth amendment to the Constitution of the United States. (*Simmons v. United States*, 142 U. S., 148.)
- 2 (U. S. Sup. Ct., 1891). The judge presiding at a trial, civil or criminal, in any court of the United States may express his opinion to the jury upon the questions of fact which he submits to their determination. (*Ib.*)
- 3 (U. S. C. C. A., 1901). In determining the number of peremptory challenges to which a bank teller accused of embezzling funds of the bank in violation of Revised Statutes United States, section 5209, is entitled, the offense will be considered a misdemeanor, regardless of the penalty attached thereto, since the statute defining and creating it explicitly says that a party guilty thereof "shall be deemed guilty of a misdemeanor." (*Tyler v. United States*, 106 Fed. Rep., 137.)
- 4 (U. S. C. C. A., 1900). An issue as to the guilt of a defendant on a charge of making false entries in a report made as an officer of a national bank, where the defendants claimed that the overdrafts in question bore interest and were reported by him in good faith under the head of loans and discounts, the sufficiency of such defense, both as to the facts and the question of good faith, was a matter for the determination of the jury. (*Dorsey v. United States*, 101 Fed. Rep., 746.)
- 5 (U. S. C. C. A., 1898). Where an indictment contains many counts, all alike, except as to amounts of money and dates of misapplication, it is sufficient to read one count in full to the jury, explain the difference, and state the amount and date charged in each of the other counts. (*Gallot v. United States*, 87 Fed. Rep., 446.)
- 6 (U. S. C. C. A., 1898). A juror who says he has an impression or opinion as to guilt or innocence of defendant, formed from newspapers and rumors, that it would require evidence to remove it, but that it



## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## PRACTICE, JURY—continued.

would yield to evidence, and that he can and will give the defendant a fair and impartial trial according to the evidence that may be adduced before him, is competent. (*Gallot v. United States*, 87 Fed. Rep., 446.)

- 7 (U. S. C. C. A., 1898). Where an indictment consists of numerous counts, the trial court may, in the exercise of sound judicial discretion, require the Government to elect certain counts upon which it will ask conviction; but where the counts are all for transactions connected together, or of the same class, their joinder is proper under Revised Statutes, section 1024, and the exercise of the court's discretion will not be disturbed, except in a clear case of improvidence or abuse. (*Gardes v. United States*; *Girault v. Same*, 87 Fed. Rep., 172.)
- 8 (U. S. C. C. A., 1898). Where, after mistrial, and before a new trial, amendments are made to purely formal parts of certain counts of an indictment, and the defendants are not rearraigned, even if the irregularity is material, it can affect only the counts so amended, and the error is cured by arrest of judgment on such counts. (Ib.)

## JURORS' DUTY AS TO REASONABLE DOUBT.

- 1 (U. S. Sup. Ct., 1894). In a criminal trial the burden of proof is on the Government, and the defendant is entitled to the benefit of a reasonable doubt; and when testimony contradictory or explanatory is introduced by the defendant, it becomes a part of the burden resting upon the Government to make the case so clear that there is no reasonable doubt as to the inferences and presumptions claimed to flow from the evidence. (*Potter v. United States*, 155 U. S., 439.)
- 2 (U. S. C. C., 1893). If much the larger number of the jury are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of others equally honest and equally intelligent with himself, who have heard the same evidence with an equal desire to arrive at the truth, and under the sanction of the same oath. On the other hand, if a majority are for acquittal, the minority ought to seriously ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows. (*United States v. Allis*, 73 Fed. Rep., 165.)

## VERDICT.

- 1 (U. S. C. C. A., 1898). One indictment in thirty-six counts charged defendant with aiding in the abstraction of thirty-six specified amounts of money, at thirty-six specified dates. Another indictment charged him with aiding in the misapplication of the same amounts, upon the same dates. The two were tried together, and the jury returned a verdict of "guilty as charged." *Held*, that the verdict was definite, certain, responsive to the issues, and not a double conviction, the sentence imposed by the court being imprisonment for a less term than the maximum under any one count. (*Gallot v. United States*, 87 Fed. Rep., 446.)
- 2 (U. S. C. C. A., 1898). Where the jury finds accused guilty upon all counts of an indictment, "Guilty as charged," without specifying the counts, is a proper form of verdict. (*Gardes v. United States*; *Girault v. Same*, 87 Fed. Rep., 172.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued,

## TRIAL AND ITS INCIDENTS—Continued.

## VERDICT—continued.

- 3 (U. S. C. C. A., 1898). Where the verdict is sustained by one good count in the indictment, it must stand, even if all the other counts are bad. (Ib.)
- 4 (Nebr. Sup., 1900). A verdict in favor of one defendant and against another, based upon conflicting evidence, which is the same as to both defendants, can not be permitted to stand as to either. (Germer v. Yates et al., 3 Banking Cases, 95; 61 Nebr., 100.)

*Submitting question of insanity at time of trial.*

- 5 (U. S. Dist. Ct., 1902). Where the question whether a defendant in a criminal case was insane at the time of the trial is submitted to the jury for a preliminary finding, a unanimous verdict of insanity is required to authorize the court to take action thereon. (United States v. German, 115 Fed. Rep., 987.)

## SENTENCE.

- 1 (U. S. Sup. Ct., 1896). The sentence on both counts having been distinct as to each, the entire amount of punishment imposed will be undergone, although the conviction and sentence as to the second count are set aside. (Putnam v. United States, 162 U. S., 687.)
- 2 (U. S. C. C. A., 1901). The record in a misdemeanor case not showing that defendant was present when sentenced, the case will be remanded for new sentence. (Breese v. United States, 106 Fed. Rep., 680.)
- 3 (U. S. C. C., 1887). Upon a plea of guilty to three indictments found under section 5209, Revised Statutes United States, one for the misapplication of funds of a national bank by the accused while cashier thereof, one for false entries to conceal such misapplication, and the third for making a false statement with intent to deceive the examining officers, the district court pronounced sentence upon the accused as follows: "That the prisoner be confined at hard labor in the State prison of the State of New Jersey for the term of five years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid." *Held*, that the words "said terms not to run concurrently" are uncertain and incapable of application, and therefore void; and that the sentences commenced at once and ran concurrently. (United States v. Patterson, Keeper, etc., 29 Fed. Rep., 775.)
- 4 (U. S. C. C. A., 1898). Where the statute under which a prisoner is sentenced provides for imprisonment, but not at hard labor, the words "at hard labor" should not be inserted in the sentence, even if hard labor is a part of the discipline of the prison at which the sentence is to be served. (Gardes v. United States; Girault v. Same, 87 Fed. Rep., 172.)

## APPEAL.

- 1 (U. S. Sup. Ct., 1891). In a criminal case a general judgment upon an indictment containing several counts and a verdict of guilty on each count can not be reversed on error if any count is good and is sufficient to support the judgment. (Claasen v. United States, 142 U. S., 140.)
- 2 (U. S. Sup. Ct., 1891). Upon writ of error no error in law can be reviewed which does not appear upon the record, or by bill of exceptions made part of the record. (Ib.)

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## APPEAL—continued.

- 3 (U. S. Sup. Ct., 1891). Under section 5 of the act of March 3, 1891, entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," a writ of error may, even before July 1, 1891, issue from this court to a circuit court in the case of a conviction of a crime under section 5209 of the Revised Statutes where the conviction occurred May 28, 1890, but a sentence of imprisonment in a penitentiary was imposed March 18, 1891. (*In re Claassen*, 140 U. S., 200.)
- 4 (U. S. Sup. Ct., 1891). A crime is "infamous" under that act where it is punishable by imprisonment in a State prison or penitentiary, whether the accused is or is not sentenced or put to hard labor. (*Ib.*)
- 5 (U. S. Sup. Ct., 1891). Such writ of error is a matter of right, and under section 999 of the Revised Statutes the citation may be signed by a justice of this court as an authority for the issuing of the writ under section 1004. (*Ib.*)
- 6 (U. S. Sup. Ct., 1891). At the time of the conviction no writ of error from this court in the case was provided for by statute, nor was any bill of exceptions, with a view to a writ of error, provided for by statute or rule, and therefore a mandamus will not lie to the judge who presided at the trial to compel him to settle a bill of exceptions which was presented to him for settlement after the sentence, nor can the minutes of the trial, as settled by the judge by consent, and signed by him, and printed and filed in July, 1890, and on which a motion for a new trial was heard in October, 1890, be treated by this court, on the return to the writ of error, as a bill of exceptions properly forming part of the record. (*Ib.*)
- 7 (U. S. Sup. Ct., 1891). A criminal court in the southern district of New York, sitting as a circuit court therein, under section 613 of the Revised Statutes, and composed of the three judges named in that section, to hear a motion for a new trial and an arrest of judgment in a criminal case previously tried by a jury before one of them, is a legally constituted tribunal. (*Ib.*)
- 8 (U. S. Sup. Ct., 1891). A justice of this court on allowing such writ and signing a citation had authority also to grant a supersedeas and stay of execution. (*Ib.*)
- 9 (U. S. C. C. A., 1898). Under rule 11 of the circuit court of appeals (21 C. C. A., cxi, and 78 Fed. Rep., cxi), requiring the assignment of errors to quote the full substance of evidence alleged to have been erroneously admitted or rejected, and to set out the part of the charge referred to totidem verbis, assignments that "the court erred in permitting evidence as shown in bills of exceptions numbers two and three," which errors can only be ascertained by a careful reading of a voluminous record, and that "the court erred in its charge," etc., referring to marked lines and numbers in the written opinion for instructions erroneously given and refused, will not be considered. (*Gallot v. United States*, 87 Fed. Rep., 446.)

*Habeas corpus*—When judgment is void for any reason the party imprisoned under it can be released on *habeas corpus*.

- 10 (U. S. C. C., 1887). The judgment of the district and circuit courts of the United States in criminal cases is final, and can not be reviewed by writ of error; but if a judgment, or any part thereof, is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless and without meaning and can

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## PROSECUTIONS—Continued.

## TRIAL AND ITS INCIDENTS—Continued.

## APPEAL—continued.

not be corrected, or for any other cause, the party imprisoned by virtue of such judgment may be discharged on habeas corpus. (*United States v. Patterson*, keeper, etc., 29 Fed. Rep., 775.)

- 11 (U. S. C. C., 1887). On a habeas corpus the decision should be made upon the actual status of the case at the time of the decision, and not according to the state of things when the writ was allowed. When, at the time the writ of habeas corpus for the discharge of a prisoner, under three sentences of five years, each running concurrently, was allowed, the first term of five years had not expired by lapse, although at least one of the sentences had been satisfied by means of remissions for good conduct. *Held*, that the five years having entirely elapsed since the allowance of the writ, the question of the applicability of the remission for good conduct to all the sentences may be waived and the prisoner discharged. (Ib.)

## WHEN BOTH STATE AND UNITED STATES HAVE JURISDICTION.

- 1 (U. S. Sup. Ct., 1889). A State is not deprived of jurisdiction over a person who criminally forges a bill of exchange or promissory note with intent to defraud, in violation of its statutes, or of its power to punish the offender committing such offense, by the fact that he follows this crime up by committing against the United States the further crime of making false entries concerning such bill or note on the books of a national bank, with intent to deceive the agent of the United States designated to examine the affairs of the bank, and in violation of the statute of the United States in that behalf. (*Cross v. North Carolina*, 132 U. S. R., 131.)
- 2 (U. S. Sup. Ct., 1889). The false making or forging of a promissory note in a State, purporting to be executed by an individual, and made payable at a national bank, is not a fraud upon the United States, or an offense described in Revised Statutes, section 5418. (Ib.)
- 3 (U. S. Sup. Ct., 1889). The same act or series of acts may constitute an offense equally against the United States and against a State, and subject the guilty party to punishment under the laws of each government. (Ib.)

## LIABILITY OF NATIONAL BANK OFFICERS UNDER STATE STATUTES.

- 1 (U. S. Sup. Ct., 1903). Congress, having the power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations. Congress having dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital, and full and adequate provision having been made for the protection of creditors of national banks by requiring frequent reports to be made of their condition, and by the power of visitation of Federal officers, it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the General Government. (*Easton v. Iowa*, 188 U. S., 220.)
- 2 (U. S. Sup. Ct., 1903). While a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction, and it may declare, by special laws, certain acts (such

## OFFICERS, CRIMINAL LIABILITY OF—Continued.

## LIABILITY OF NATIONAL BANK OFFICERS UNDER STATE STATUTES—continued.

- as the receipt of deposits when bank is insolvent) to be criminal offenses when committed by officers and agents of its own banks and institutions, it is without lawful power to make such special laws applicable to banks organized and operated under the laws of the United States. (*Easton v. Iowa*, 188 U. S., 220.)
- 3 (U. S. C. C., 1893). The offense of making false entries in the books of a bank, for which an officer of the bank is liable to punishment under section 5209, Revised Statutes, since it is not a crime of which the State courts have concurrent jurisdiction under section 5328, Revised Statutes, is exclusively cognizable by the Federal courts. (In re *Eno*, 54 Fed. Rep., 669.)
  - 4 (Conn.) It is competent for a State by penal enactments to protect its citizens in their dealings with national banking associations located within the State. (*State v. Tuller*, 34 Conn., 280.)
  5. The officers of a national banking association may be prosecuted under State statutes for fraudulent conversion of the property of individuals deposited with and in the custody of the association.  
(Conn.) *State v. Tuller*, 34 Conn., 280;  
(Mass.) *Commonwealth v. Tenney*, 97 Mass., 50.
  - 6 (Ill. Sup., 1877). Defendant, a bookkeeper in a national bank, without authority filled a draft signed in blank by the assistant cashier, issued it, and fraudulently changed his book entries to cover the crime. *Held*, on an indictment for forgery, that the crime was within the jurisdiction of the State courts. (*Hoke v. People*, 122 Ill., 511; 3 N. B. C., 372.)
  - 7 (Mass.). As the national banking law makes the embezzlement, abstraction, or willful misapplication of the funds of a national banking association merely a misdemeanor, a person who procures such an offense to be committed can not be punished under a State statute which provides that a person who procures a felony to be committed may be indicted and convicted of a substantive felony. (*Commonwealth v. Felton*, 101 Mass., 204.)
  8. An officer of a national banking association can not be punished under State laws for embezzling the funds of the association.  
(Mass.) *Commonwealth v. Felton*, 101 Mass., 204;  
(Pa.) *Commonwealth ex rel. v. Ketner*, 92 Pa. St., 372.
  - 9 (Mass.). Where the offense committed by an officer is properly a larceny of the funds, and not an embezzlement, he may be indicted under a State law. (*Commonwealth v. Barry*, 116 Mass., 1.)
  - 10 (Mich. Sup., 1886). State courts have no jurisdiction of the offense of embezzlement of the funds of a national bank. (*People v. Fonda*, 62 Mich., 401; 3 N. B. C., 501.)
  - 11 (Ohio Sup., 1889). The only remedy for the making of a false return to the auditor, by the cashier of a bank, of the resources and liabilities of the bank, for the purposes of taxation, is afforded by Revised Statutes of Ohio, section 2679, which provides that the auditor may examine the books of the bank, and any officer or agent of it under oath, and make out the statement; and any officer of the bank may be fined not exceeding \$100 for failing to make the statement, or for willfully making a false one. (*Miller v. First National Bank of Cincinnati*, 21 N. E., 860; 46 Ohio St., 424.)
  - 12 (Pa.). And an officer may be punished under State laws for making false entries in the books of the association with intent to defraud it. (*Luberg v. Commonwealth*, 94 Pa. St., 85.)

## OFFSETS.

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## GENERALLY.

*Law of what place governs.*

1. Set-off must be governed by the law of the place where, in case of controversy, suit must be brought to settle the rights of the parties.  
(U. S. C. C.) *Vose v. Philbrook*, 3 Story, 335;  
(N. H.) *Gibbs v. Howard*, 2 N. H., 296;  
(N. Y.) *Ruggles v. Kuler*, 3 Johns, 263;  
(Pa.) *Savary v. Savary*, 3 Clark, 271.
- 2 (U. S. C. C. A., 1896). The right to set-off, except as it is enforced in equity, is a matter of local legislation; and the Federal courts, sitting in any State, when dealing with the subject, will follow the rules established by the tribunals of the State. (*Charnley v. Sibley et al.*, 73 Fed. Rep., 980.)

*Must be mutuality.*

- 3 (U. S. Sup. Ct.). A separate demand can not be set off against a joint one, or a joint debt against a separate one.  
(U. S. Sup. Ct., 1873) *Gray v. Rollo*, 18 Wall., 629;  
(U. S. Sup. Ct., 1875) *Scammon v. Kimball*, 92 U. S., 362.
4. An executor, administrator, or public officer is not entitled to set off against his liability as such any indebtedness from bank to himself individually, nor contra.  
(Ill.) *Stowe v. Yarwood*, 14 Ill., 424;  
(Ky.) *Benton v. Holmes*, executor, 1 A. K. Marsh, 19.
- 5 (U. S. C. C. A., 1894). Debts of a partner and his firm to a bank can not, in equity, be set off by a receiver of the bank against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed. (*Fisher v. Knight*, 61 Fed. Rep., 491.)
- 6 (Colo. App., 1892). In an action on a note by a firm, to which it is payable, defendant can not offset a claim against a copartner of such firm. (*Woolman v. Capital National Bank*, Colo. App., 31 P., 235; 2 Colo. App., 454.)
- 7 (Colo. App., 1892). No reply is required to an answer, in an action on a note, admitting the execution and delivery of the note, but denying that plaintiff has any interest in the same, and alleging that the action is brought under a conspiracy between plaintiff and a copartner of the payee firm to prevent a set-off by defendant against such partner. (*Ib.*)
- 8 (Ill. App.). Under an assignment for the benefit of creditors, a note given for obligations of the firm should be allowed against the firm assets, though it was signed by the partners individually. (*Union National Bank v. Henry Dreyfus & Co.*, 61 Ill. App., 323.)

## OFFSETS—Continued.

## GENERALLY—continued.

- 9 (Ill. App.). One of two joint makers of a note to a bank can not defeat the right of the bank to set off his individual deposit by showing the partnership character of the debt, the bank not having had notice thereof. (*Merchants' Nat. Bank v. Maple*, 65 Ill. App., 484.)
- 10 (Minn. Sup., 1878). The receiver of an insolvent national bank sued A and B on their joint note given to the bank. They claimed to set off notes given by the bank, and C and D, who were also insolvent, as joint makers, to D alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off. (*Balch v. Wilson*, 25 Minn., 299; 2 N. B. C., 274.)
- 11 (Tex. Civ. App., 1893). A judgment obtained in another than the attachment suit can not be set off against damages claimed for a wrongful attachment. (*Imperial Roller Milling Company v. First National Bank of Cleburne*, 27 S. W., 49.)

*Exception to rule requiring mutuality.*

12. Where, however, a note is signed by one as principal and others as sureties, the indebtedness of the bank to the principal may be set off. (Ill.) *Himrod v. Baugh*, 85 Ill., 435; (N. H.) *Andrews v. Varrell*, 46 N. H., 17.

*Attorney's lien does not affect.*

- 13 (U. S. C. C., 1881). An attorney's lien upon a judgment is subject to any existing right of set-off in the other party to the suit. (*National Bank of Winterset v. Eyre et al.*, 8 Fed. Rep., 733.)

*When voluntary payment waives set-off.*

- 14 (U. S. C. C. A., 1896). The voluntary payment by the maker of a promissory note, with a full knowledge of all the facts, operates as an abandonment and waiver of all right to set off cross demands or independent debts, and a bill disclosing such facts presents no case for equitable relief by way of equitable set-off. (*United States Bung Manufacturing Co. v. Armstrong*, 34 Fed. Rep., 94.)

*When torts can not be set off against contracts.*

- 15 (U. S. C. C. A., 1896). Where the State statute of set-off, as in Illinois, does not authorize a set-off, in action on contract, of unliquidated damages arising out of contracts or torts not connected with the subject-matter of the suit, there can be no set-off, in an action at law, of such damages, even as against an insolvent or nonresident plaintiff. (*Charnley v. Sibley et al.*, 73 Fed. Rep., 980.)

*Inconsistent claims as offsets.*

- 16 (U. S. C. C. A., 1896). It is no objection to a set-off, claimed by a defendant, that it is inconsistent with another set-off previously claimed by him and rejected as improper. (Ib.)

*Set-off against deceased depositor.*

- 17 (Ky. App., 1903). Where decedent had money on deposit in a bank at the time of his death, and the bank held a note against him for a less amount, which matured the day after his death, it was entitled to set off the amount of the note against the deposit, and pay the decedent's administrator the difference. (*Little's Admr. v. City Nat. Bank of Fulton*, 5 B. C., 728; 74 S. W. Rep., 699.)

*Maker's claim against intermediate indorser as set-off.*

- 18 (Ala.). As against the assignee or holder of promissory note, suing the maker, the doctrine of set-off has never been carried further than to put him in the place of the payee or party having the beneficial interest; and a set-off in favor of the maker against an intermediate holder has been uniformly disallowed, in the absence of an agreement founded on new consideration, between the maker and such intermediate holder. (*Goldthwaite v. National Bank*, 67 Ala., 549.)

## OFFSETS—Continued.

## GENERALLY—continued.

- 19 (Ala.). In the absence of all intervening equities, courts of equity put the same construction on statutes of set-off as do courts of law. Insolvency is recognized as a ground for the allowance of a set-off in equity, when it would not be allowed at law, but it is only the insolvency of the original creditor against whom the claim is asserted; and while the assignee of nonnegotiable paper takes it subject to all equities to which it was subject in the hands of the assignor, this means only the equities between the original parties, and does not include equities which may arise between other parties in the course of its transfer. (Ib.)

*Set-off must be held when suit is brought.*

- 20 (Ala.). A cross demand, to be available as a set-off at law, must be such as would support an independent action at law by the defendant, at the commencement of the suit; hence, a payment of his principal's debt by the surety, after the commencement of suit against him on a debt due to his principal, is not available as a set-off in the action. (Goldthwaite v. National Bank, 67 Ala., 549.)

*Set-off of judgments against each other.*

- 21 (Ohio Sup.). A company borrowed money from a national bank at a rate of interest in excess of that prescribed by Revised Statutes United States, section 5197, and gave its note to the bank for \$5,000. The bank also discounted, from time to time, sundry notes indorsed by the company to the bank in the ordinary course of business. Before the maturity of any of the notes the company became insolvent, and a receiver was appointed who took charge of all its property. The receiver thereafter recovered a judgment against the bank for twice the amount of interest paid by the company to the bank on the note for \$5,000, as the penalty provided for taking interest in excess of the rate prescribed by the statute. Subsequently to the recovery of that judgment, the bank obtained two judgments in the same court in which the receiver brought his action—one for the balance due on the note for \$5,000, and one against the company for the amount due on the discounted notes indorsed by the company to the bank. *Held*, in an action to enjoin the collection of a balance due on the judgment in favor of the receiver and for other relief, that the judgments in favor of the bank were, on principles of equity, a proper subject of set-off against the judgment in favor of the receiver. (Barbour v. National Exch. Bank of Tiffin, 33 N. E., 542; 50 Ohio St., 90.)

*Dividends may be set off against stockholder's debt to bank.*

- 22 (Tex. Civ. App., 1894). A bank may lawfully set off indebtedness of a stockholder to the bank against dividends accruing on such stockholder's shares. (First National Bank v. De Morse, 26 S. W., 417.)

*Special deposit, payment by third party as offset.*

- 23 (Tex. Civ. App., 1895). In an action against a bank and its officers and receivers for the conversion of a special deposit, a set-off will be allowed for the payment of part of the deposit by an agent bank in a foreign country, also in the hands of a receiver, to which the deposit had been transferred. (El Paso National Bank v. Fuchs, Tex. Civ. App., 34 S. W., 203.)

*State statutes.*

- 24 (U. S. Sup. Ct., Ark., 1899). Under the statute of Arkansas, Gould, Digest, Arkansas, page 1020, section 5, in an action at law against the receiver of a national bank, defendant may set off against plaintiff's demand a debt due the bank by plaintiff, and thereby have the amount due plaintiff reduced. (Auten v. United States Nat. Bank of New York, 1 Banking Cases, 416; 174 U. S., 125.)

- 25 (Mass.). A certificate of deposit issued by a national bank is not a promissory note within the meaning of General Statutes, chapter 53,



## OFFSETS—Continued.

## GENERALLY—continued.

section 10; and in an action thereon by a person to whom it has been transferred by the depositor the bank is not entitled to set off the amount due upon a promissory note given by the depositor to and discounted by the bank, the certificate being issued for the proceeds of such note. (*Shute v. Pacific National Bank*, 136 Mass., 487.)

- 26 (N. Y.). In an action against a bank, commenced prior to the going into effect of the new code, by the personal representatives of a deceased customer, to recover a deposit which was due and payable to the deceased in his lifetime, *held*, that the defendant could not, as matter of law and in the absence of facts entitling it to equitable relief, set off a claim against the deceased which did not become due until after his death. (*Jordan, Administratrix, etc., v. The National Shoe and Leather Bank of New York*, 74 N. Y., 467.)
- 27 (N. Y.). A demand, to be set off in such an action, must have been due and payable from the decedent in his lifetime. (*Ib.*)

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS.

*Rules of set-off applicable to insolvent banks.*

- 1 (U. S. Sup. Ct., 1892). Acts of Congress in relation to the administration of the assets of insolvent banks authorize no other rules of set-off than those recognized by courts in the settlement of the affairs of other insolvent corporations. (*Scott v. Armstrong*, 146 U. S., 499.)
- 2 (Nebr. Sup., 1898). As against the holder of a check against an account of a depositor, the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent. (*Columbia Nat. Bank of Lincoln v. German Nat. Bank of Lincoln*, 1 Banking Cases, 43; 56 Nebr., 803.)
- 3 (N. C. Sup., 1899). Even if such an indebtedness to the bank has not matured, if the depositor becomes insolvent, the bank, by virtue of the right of equitable set-off, may apply the deposits with it of such debtor to his indebtedness. (*Hodgin v. People's Nat. Bank*, 124 N. C., 540.)
- 4 (N. C. Sup., 1899). Under the statutes of North Carolina a deposit by defendant in the plaintiff bank, made after the bringing of the action, can not be set up as a counter-claim, and does not entitle the depositor to equitable interference in his behalf upon the insolvency of plaintiff and the substitution of its receiver as party plaintiff. (*Piedmont Bank of Morgantown et al. v. Wilson et al.*, 2 Banking Cases, 42; 124 N. C., 562.)

*Set-off of deposit against debt to bank.*

- 5 (U. S. Sup. Ct., 1892). The Third National Bank in New York was the correspondent of the Albion bank, a country bank. W., during part of the time in which the transactions in controversy took place, was cashier, and during the remainder was president of the Albion bank. During all the time W. practically managed that bank, and his codirectors and other officers had little or no oversight of its affairs. He was engaged in stock speculations on his own account in New York, and drew from time to time for his own purposes in favor of K. & Co., his brokers, on the bank balance with the Third National Bank. K. & Co. from time to time returned to that bank sums to be credited to the Albion bank. The latter bank eventually became insolvent, being ruined by fraudulent operations of W., who disappeared, and was put in the hands of a receiver, who brought suit against K. & Co. to recover the sums so paid to them by W. out of the balance to the credit of the bank with the Third National. K. & Co. claimed to offset the return payments made by them to the Third National, but the trial court ruled that they were not entitled to do it, and no question in respect of them was submitted to the jury. *Held*, that the defendants were entitled to have it submitted to the

## OFFSETS—Continued.

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

jury whether the other directors and officers of the Albion bank might not in the exercise of proper and reasonable care have ascertained that these moneys had been deposited to the credit of the Albion bank, and whether they would or would not have accepted such deposits as the return of the moneys to the bank. (*Kissam v. Anderson*, 145 U. S., 435.)

- 6 (U. S. C. C., 1888). On the failure of a national bank a depositor was indebted to it on eleven notes to the amount of \$5,000, and had on deposit some \$2,900. The receiver of the bank agreed that this sum should go as a set-off on the indebtedness, the depositor to pay the notes first coming due, and the deposit to be applied on the last-maturing notes. After paying the first two notes it was found that the others were in the hands of third parties, and the depositor was compelled to pay them, and filed a bill to authorize the receiver to refund the money paid under a mutual mistake. This bill was heard by the district judge of the western district of Tennessee, sitting in the circuit court of the southern district of Ohio. *Held*, that the deposit should properly be set off against the claim of the bank and the depositor should recover the sum paid by him; but as the district judge of the southern district of Ohio had held, in an action between the same bank and a creditor, the circuit judge concurring therein, that the plea of set-off was not available, in order that there might not be different rules of set-off in the same court in the case of the same insolvent, and as the case can not be appealed, it will be remanded for reargument before the regular judges, who may, in their discretion, provide for a dissent of record, or do what may to them seem right in the premises. (*Snyder's Sons Co. v. Armstrong*, 37 Fed. Rep., 18.)
- 7 (U. S. C. C. A., 1892). The indorser of a note discounted by a national bank, and which matures after the bank becomes insolvent and a receiver is appointed, is entitled, *when the maker is insolvent*, to set off against the note the amount of his deposit in the bank at the time of its failure. (*Yardley v. Clothier*, 51 Fed. Rep., 506.)
- 8 (U. S. C. C., 1893). In an action at law by the receiver of a national bank on a note, the maker may place as set-off any debt of the bank to him existing at the time of its failure, as the receiver takes the choses in action belonging to the bank subject to all claims and defenses which might have been interposed as against the bank before the liens of the United States and general creditors attached. (*Adams v. Spokane Drug Co.*, 57 Fed. Rep., 888.)
- 9 (N. J. Sup., 1896). A bank may set off against a general deposit a debt due it from the depositor. (*People's Bank and Trust Co. v. Tufts*, N. J. Sup., 35 A., 792; 59 N. J. L., 380.)
- 10 (N. Y. Sup.). The indorser of note held by an insolvent bank may have his money on deposit in the bank set off against the note, though the note was not due when the bank assigned, if the maker is insolvent and the indorser has no security. (*O'Connor v. Brandt*, Sup., 42 N. Y. S., 1079.)
- 11 (N. Y.). Where a depositor is sued by the temporary receiver of a bank on a note payable thereto, set-off to the amount of his deposit may be allowed defendant, on application to the court. (*People v. St. Nicholas Bank*, 28 N. Y. S., 114; 76 Hun, 522, followed. *Sickles v. Herold*, Com. Pl., 36 N. Y. S., 488.)
- 12 (N. Y.). In an action by the temporary receiver of a bank against a depositor on a note payable to the bank, where the amount of defendant's deposit, which bears no interest, is allowed as a set-off, the receiver will not be required to pay any interest thereon, in the absence of proof that the money earned any interest while in his hands. (*Ib.*)
- 13 (N. Y. Sup., 1872). A person liable upon a note to an insolvent national bank may set off, against his indebtedness, the amount of his

## OFFSETS—Continued.

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

- deposits with the bank. (*Platt v. Bentley*, 1 N. B. C., 758; 11 Am. L. Reg., 171.)
- 14 (N. C. Sup., 1894). When a bank closes its doors and commits an act of insolvency, its deposits, whether on account or certificate, at once become due without demand or notice, and are to be set off against a depositor's debt due the bank. (*Davis v. Industrial Mfg. Co.*, 19 S. E., 371; 114 N. C., 321.)
- 15 (Ohio Sup., 1892). A national bank received on deposit a check drawn by plaintiff on another bank, and carried the amount to the credit of his agent, upon the agreement that he would take for part of the sum a draft drawn on another bank and would not immediately check out the balance. Before the draft was presented, the drawer bank, which was insolvent, passed into the hands of a receiver, without having provided any funds with which to pay it. The check, payment of which had been stopped, came into the possession of the receiver, and the draft belonged to plaintiff. *Held*, that plaintiff was entitled in equity to have the amount of the draft set off against his liability on the check. (*Armstrong v. Warner*, 31 N. E., 877; 49 Ohio St., 376.)
- 16 (Tex. Civ. App., 1901). Where a bank held two notes of a depositor, secured by personal indorsement, and such depositor became insolvent before service on the bank of a garnishment in a suit against him, which service was prior to maturity of the notes, the bank was entitled to offset such notes against the deposit. (*Neely v. Grayson County Nat. Bank*, 61 S. W., 559; 25 Tex. Civ. App., 513.)
- 17 (Tex. Civ. App., 1894). Revised Statutes of United States, section 5234, relating to receivers of national banks, requires them to collect all debts, dues, and claims, and, on the order of the court, to compound debts. Section 5242 declares void any application of the assets in preference of creditors after the commission of an act of insolvency or in contemplation thereof. *Held*, that an act of a receiver of a national bank, in allowing a certificate of deposit issued by such bank as an offset to a note due the bank, signed by the holder of the certificate and another, was void, in the absence of an order of court authorizing it, where such certificate was transferred to such holder after the bank became insolvent. (*Beckham v. Shackelford*, Tex., 29 S. W., 200; 8 Tex. Civ. App., 660.)
- 18 (Tex. Civ. App., 1894). Such receiver was not estopped from collecting such note from a surety, who released security held by him on the faith of such offset, and the surrender of the note by the receiver, though the receiver knew he was a surety only, and that he held such security. (*Ib.*)

*Set-off of collection against debt to bank.*

- 19 (U. S. C. C., 1883). The plaintiffs seek to offset the amount of their credit on the books of a defunct bank against the promissory notes received by the bank for discount before its failure. *Held*, that if the bank held the notes at the time of its failure and was entitled to receive the amounts due thereon when they matured, such offset might be made; but an offset of this kind can not be allowed where it appears that the notes were not the property of the bank at the time of its failure, but had been indorsed away for value. (*Balbach et al. v. Frelinghuysen, Receiver, etc.*, 15 Fed. Rep., 675.)
- 20 (N. Y.). The plaintiff, who was surety for the repayment of certain sums deposited in defendant bank, which were due and payable at the time the bank suspended, owed certain notes to the bank which became due before a receiver was appointed for such bank. On account of the time required to fix plaintiff's liability he did not pay the creditors for some time after suspension. *Held*, that payment will be deemed to relate back and to have been made at the time of suspension, and the amount so paid may be set off against the notes held by the bank against plaintiff. (*Kilby v. First Nat. Bank*, 66 N. Y. S., 579; 32 Misc. Rep., 370.)

## OFFSETS—Continued.

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

*Claim on bank must be held at time of failure.*

21. One indebted to bank can not set off a claim against bank acquired subsequent to its suspension.  
(U. S. Sup. Ct., 1892.) *Scott v. Armstrong*, 146 U. S., 511;  
(Mass.) *Colt v. Brown*, 12 Gray, 233;  
(Pa.) *Venango National Bank v. Taylor*, 56 Pa. St., 14.
- 22 (Colo. Sup., 1902). A debtor of an insolvent bank can not set off against his debt a claim against it which he bought after its insolvency.  
(*Dyer v. Sebrell*, 4 Banking Cases, 414.)
- 23 (Fla. Sup., 1901). Section 2193, Revised Statutes, is directed against certain transactions taking place after the commission of an act of insolvency by banks, or in contemplation thereof, made with a view to the preference of one creditor to another. Where a party owes the bank a note, and also has a credit to his deposit account for deposits made while the bank is solvent, and not in contemplation of its insolvency, and the bank officials and such party, after the bank becomes insolvent, enter the amount of the balance due such party on his deposit account as a credit on the note, the statute is not violated, and such credit may be pleaded as a payment on the note in an action brought to recover on such note by a receiver subsequently appointed. (*Robinson v. Aird*, 3 Banking Cases, 309; 43 Fla., 30.)
- 24 (Mich. Sup., 1902). A depositor in an insolvent bank may set off the deposit standing to his credit when the bank closed its doors against his notes payable to the bank but not then due. (*Thompson v. Union Trust Co.*, 4 Banking Cases, 549; 130 Mich., 508.)
- 25 (N. Y. Sup.). Under Revised Statutes United States, section 5236, providing that the Comptroller of the Currency, after providing for the redemption of the notes of an insolvent national bank, shall make a ratable dividend of the money paid him by its receiver among those who proved claims against it, and section 5242, providing that transfers of notes owing a national bank, made after it has committed an act of insolvency, to prevent such application of its assets, shall be void, the maker of a note held by an insolvent national bank can not, in defense to an action thereon by its receiver, offset a claim against the bank which was assigned to him after the bank suspended and before the receiver was appointed. (*Davis v. Knipp*, Sup., 36 N. Y. S., 705.)
- 26 (N. Y. Sup.). Where, between suspension by a bank and commencement of an action for and resulting in its dissolution and appointment of a receiver, one liable to it as indorser on notes takes assignments of deposit accounts, he may offset them against his liability, in an action by the receiver, unless it be shown that the bank was insolvent at the time of the assignment of the accounts; and this is not shown by the recital in an agreed statement of facts that, at the commencement of the action to dissolve, the bank "was insolvent, having suspended its business" on a certain day. (*Higgins v. Worthington*, Sup., 35 N. Y. S., 815.)
- 27 (Ohio Sup., 1877). A right of set-off, perfect and available against a bank at the time of the appointment of a receiver, may be pleaded in an action by the receiver. (*Hade, Receiver, v. McVay*, 2 N. B. C., 353; 31 Ohio State, 231.)
- 28 (Pa.). But a debtor can not set off the amount of a deposit assigned to him after the act of insolvency committed. (*Venango National Bank v. Taylor*, 56 Pa. St., 14.)
- 29 (Pa. Sup., 1867). A national bank having become insolvent, a depositor therein assigned his deposit to a debtor of the bank. *Held*, that the latter could not offset such deposit against his debt in an action thereon. (*The Venango National Bank v. Taylor*, 56 Pa. St., 14; 1 N. B. C., 842.)

## OFFSETS—Continued

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

*When claims grow out of same transaction.*

- 30 (U. S. Sup. Ct., 1892). The ordinary equity rule of set-off in case of insolvency is that where the mutual obligations have grown out of the same transaction insolvency on the one hand justifies the set-off of the debt due on the other, and there is nothing in the statutes relating to national banks which prevents the application of that rule to the receiver of an insolvent national bank under circumstances like those in this case. (*Scott v. Armstrong*, 146 U. S., 499.)
- 31 (U. S. Sup. Ct., 1892). A customer of a national bank who, in good faith, borrows money of the bank, gives his note therefor due at a future day, and deposits the amount borrowed to be drawn against, any balance to be applied to the payment of the note when due, has an equitable (but not a legal) right, in case of the insolvency and dissolution of the bank, and the appointment of a receiver before the maturity of the note, to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note. (Ib.)

*Offsets need not be due at time of suspension.*

32. Right of set-off is allowable whether the indebtedness sought to be set off had or had not matured at time of bank's suspension.  
(U. S. Sup. Ct., 1892) *Scott v. Armstrong*, 146 U. S., 499;  
(U. S. C. C.) *Drake v. Rolio*, 3 Biss., 273;  
(Pa.) *Skiles v. Houston*, 110 Pa. St., 254.
- 33 (Md. Appls., 1889). At common law a depositor may set off the balance due on his deposit account against his note to the bank in the possession of its receiver, even though the note did not mature until after the insolvency of the bank, and no demand has been made for the deposit. And this rule is not changed by the statutes of Maryland. (*Colton et al. v. The Drovers Perpetual Building and Loan Ass'n of Baltimore*, 2 Banking Cases, 243; 90 Md., 85.)
- 34 (N. Y.). While, as a general rule in the administration of the estate of an insolvent debtor, equality among creditors is equity, courts are not required to ignore the principle that only the balance, in case of mutual debts, is the real sum owing by or to the insolvent. (*Hughitt v. Hayes*, 136 N. Y., 163.)
- 35 (N. Y.). Claims will be regarded by a court of equity as due, notwithstanding the absence of a technical demand, when equitable considerations require that they shall be applied each to the other. (Ib.)
- 36 (N. Y.). In the application of cross demands to the satisfaction of each other the insolvency of one of the parties is a material circumstance, and although the debt owing by the insolvent may not be due the creditor may waive the credit, and a court of equity will then apply it upon the debt from the insolvent, if that has matured. (Ib.)

*Contra.*

- 37 (Mont. Sup., 1899). Where a debtor of a bank has deposits, the certificates of which have not yet matured, the fact of the bank being insolvent will not give the debtor the right to have such deposits offset against his liability. (*Stadler v. First Nat. Bank of Helena*, 56 P., 111; 22 Mont., 190.)

*Bona fide owner for value before maturity holds free of offsets.*

- 38 (U. S. C. C., 1900). An affidavit of defense in a suit by a receiver of an insolvent bank on a note of which the bank was a bona fide holder for value before maturity, alleging that defendant was an accommodation maker, and that the indorsers, who were not parties to the suit, had a certain sum on deposit in the bank when it became insolvent, which occurred after the note became due, but containing no allegations showing that they still owned such deposit, or that they desired to have the same used by the maker as a set-off in the suit against him, is insufficient to entitle him to set off the amount of such deposit

## OFFSETS—Continued.

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

on the ground that he was merely surety on the note, which was discounted by the bank in due course of business, in ignorance of his relation to the indorsers. (*Earle v. Miller*, 102 Fed. Rep., 600.)

*Section 5242 does not prevent offsets against insolvent banks.*

- 39 (Mont., 1895). Revised Statutes United States, section 5242, which requires a pro rata distribution of the assets of an insolvent national bank and forbids preferences, does not prevent a debtor of the bank from setting off against his indebtedness the amount of a claim he holds against the bank; and it is immaterial whether or not the debt due to the bank had matured at the time of its insolvency. (*Scott v. Armstrong*, 13 S. Ct., 148—146 U. S., 499, followed; *Mercer v. Dyer*, Mont., 39 P., 314; 15 Mont., 317.)
- 40 (Ohio Sup., 1892). Revised Statutes United States, section 5242, by providing that no national bank, when insolvent or in contemplation of insolvency, shall so dispose of its assets as to prevent their proper application to the redemption of its circulating notes and the ratable distribution of the remainder among its creditors, does not prohibit the allowance of any valid set-off, legal or equitable, which a debtor of the bank has against any obligation owing by him to it at the time of its solvency, the allowance of such set-off not being the creation of a preference. (*Armstrong v. Warner*, 31 N. E., 877; 49 Ohio St., 376.)

*Contra.*

- 41 (Mo. App.). In an action against the indorser of a promissory note which matured in the hands of plaintiff as receiver of an insolvent national bank, defendant's deposit in the bank can not be made the subject of a set-off, as the claim therefor existed before the receiver's right accrued, and its allowance would be contrary to the spirit of Revised Statutes, United States, section 5242, making payments of money by an insolvent national bank to shareholders or creditors, with a view to preference, or to evading the disposition of assets, as required by statute, null and void, and section 5324, requiring the receiver, after collecting debts, etc., to turn over all money to the United States Treasurer for a ratable distribution among creditors. (*Stephens v. Schuchmann*, 32 Mo. App., 333.)

*Specific performance between bank and depositor.*

- 42 (N. Y.). The First National Bank entered into an oral contract with plaintiff to sell him certain real estate for a price specified. Plaintiff took possession under the contract and made large and valuable improvements, with the knowledge and consent of the bank, which had authorized its cashier to execute a conveyance pursuant to the contract. Plaintiff had a deposit account with the bank. Shortly before the failure he, for the third time, requested the cashier to execute the conveyance; this the latter promised to do without further delay. Thereafter plaintiff accumulated his deposits with intent to use the balance to his credit in paying for the land when the deed was delivered; this was known to the cashier. Plaintiff, also with the knowledge of the cashier, purchased a certificate of deposit issued by the bank, with a view of applying it to the payment. Plaintiff also did work and furnished materials for the bank, the account for which he rendered to it before the failure, and it was agreed that it should be adjusted on the final settlement for the purchase. Plaintiff, until the bank closed its doors, had no knowledge of its insolvency or of any fact affecting its credit. In an action against the receiver of the bank for a specific performance, *held*, that plaintiff was entitled to the relief sought, and that he was entitled to be credited on the purchase price the balance due him on the deposit account, the amount of the certificate of deposit, and of the account for work and materials. (*Hughitt v. Hayes*, 136 N. Y., 163.)

## OFFSETS—Continued.

## OFFSETS BETWEEN INSOLVENT BANKS AND THEIR CREDITORS—continued.

*Claim for services to bank as a set-off.*

- 43 (N. C. Sup., 1894). A claim for pay for services, due before a bank closes its doors, is a set-off to a liability on bills discounted. (*Davis v. Industrial Manufacturing Co.*, 19 S. E., 371; 114 N. C., 321.)

*Offsets between banks.*

- 44 (Pa.). In an action by an assignee for benefit of creditors of a bank, to recover a balance due from another bank, a check drawn on the insolvent bank, which came into the hands of defendant prior to the assignment, and to which no defense is set up, should be allowed as a set-off, though defendant is not the owner of the check, but holds it for collection. (*Penn Bank v. Farmers' Deposit National Bank, Pa.*, 20 A., 150; 130 Pa. St., 209.)

*Offsets between banks and clearing house.*

- 45 (U. S. Sup. Ct., 1897). Where by a special agreement the clearing house was permitted to retain the paper of a bank each day until it settled its balance with the clearing house for that day, the clearing house is entitled up to notice of insolvency to set off the due bills for balances in clearings of the preceding days against the proceeds of the collections in its hands, but can not (it not being included in said special agreement) set off the amount due from the bank for loan certificates, as that would be a preference within the prohibition of Revised Statutes, section 5242. (*Yardley v. Philler*, 167 U. S., 344.)
- 46 (Pa., 1895). A note deposited before maturity by a bank with a clearing-house committee, to secure payment of the bank's daily balances and other indebtedness due from the bank to other members of the clearing-house association, is not in the hands of the committee subject to set-off by the maker of any sum due him from the bank. (*Philler v. Jewett, Pa.*, 31 Atl. Rep., 204; 166 Pa. St., 456.)

## WHEN DEPOSITOR INSOLVENT.

*Right to set off debt not yet due.*

1. A bank has the equitable right to set off, against deposits made with it by an insolvent, before making an assignment for the benefit of creditors, a debt due it from the insolvent which at the time of the assignment was not yet due.  
(*Ky.*, 1900). *Kentucky Flour Co.'s Assignee v. Merchants' National Bank*, 13 S. W., 910; 90 Ky., 225.  
(N. C. Sup., 1899). *Hodgin v. People's National Bank*, 124 N. C., 540.

*Contra.*

- 2 (Mo., 1897). A bank can not set off against the deposit of an insolvent depositor notes owing to it by him which had not matured at the time of his assignment in insolvency. Where a bank informed a depositor that unless his account was more satisfactory it would discontinue discounting and loaning to him, and he promised to keep a fair balance to justify the credit extended, an agreement that in case of his insolvency the bank might apply his deposit to payment of its unmatured demand against him could not be implied. (*Homer v. National Bank of Commerce, in St. Louis, Mo.*, Sup., 41 S. W., 790; 140 Mo., 225.)
- 3 (Nebr. Sup., 1898). As against the holder of a check against an account of a depositor, the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent. (*Columbia National Bank of Lincoln v. German National Bank of Lincoln*, 1 Banking Cases, 43; 56 Nebraska, 803.)
- 4 (R. I.). Where a depositor made an assignment, having at the time a deposit in the bank, which held three of its notes, two of which had matured and had not been paid, the bank could only retain from the

## OFFSETS—Continued.

## WHEN DEPOSITOR INSOLVENT—continued.

deposit a sum sufficient to pay the two notes matured at the time of the assignment; the unmatured note not being a set-off under General Laws, chapter 239, section 11, providing that a set-off must be a demand which existed at the time of the commencement of the action. (*Ellis v. First Nat. Bank of Woonsocket*, 48 A., 936; 22 R. I. 565.)

*When claims must be due in order to be used as offsets.*

5 (Ky., 1895). A bank on which a check is drawn, though not knowing that the drawer is insolvent, can not, as against the payee, set off against the deposit its indebtedness from the drawer not yet due. (*Merchants' National Bank of Louisville v. Robinson*, Ky., 31 S. W., 136; 97 Ky., 552.)

6 (N. Y. Sup.). Defendant bank discounted for W. a draft which was subsequently paid by the drawee, and placed the proceeds to W.'s credit, not knowing that plaintiff was entitled thereto. Afterwards, and while part of the proceeds remained to W.'s credit, plaintiff notified defendant of his claim. *Held*, that defendant could not set off against plaintiff's claim to such balance a claim against W. on paper discounted before the draft, but maturing after the notice of plaintiff's claim. (*Heidelberg v. National Park Bank*, Sup., 33 N. Y. S., 794.)

7 (N. Y. Sup.). A bank has no right to retain the balance of a customer's deposit to apply to an indebtedness of the customer of the bank not yet matured, unless it is authorized to do so by contract. (*Ib.*)

*General deposits may be offset against debt.*

8 (Wis., 1899). General deposits received by a bank in the regular course of business simply constitute an indebtedness from the bank to the depositor, and, upon the insolvency of the depositor, the bank may offset it against a sum owing to it by the depositor; and this right is not affected by the fact that the officers of the bank also endeavor to illegally prefer themselves as the de facto officers of the depositor (bank) by having a check drawn in favor of the bank for the amount on deposit. (*Slack v. Northwestern Nat. Bank of Superior*, 2 Banking Cases, 66; 103 Wis., 57.)

*Bankruptcy—Preferential transfer of property—Deposit in bank.*

9. The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a transfer of property amounting to a preference, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], although the bank may be at the time a creditor, and under section 68a the bank has the right to set off so much of its claims as equals the balance in such account.

(U. S. C. C. A., 1904) *In re Geo. M. Hill Co.*, 130 Fed. Rep., 315;

(U. S. Dist. Ct., 1904) *In re Scherzer*, 130 Fed. Rep., 631.

*Same—Application of deposit to debt due bank.*

10 (U. S. Dist. Ct., 1904). The application by a bank of the amount standing to the credit of a depositor in his general account, subject to check on a note of the depositor, although within four months prior to his bankruptcy, and while he was insolvent, does not constitute a preference which must be surrendered, under Bankr. Act July 1, 1898, § 57g, as amended, Act Feb. 5, 1903, c. 487, 32 Stat., 799 [U. S. Comp. St. Supp. 1903, p. 415], as a condition to the proving of a claim against the estate. (*In re Scherzer*, 130 Fed. Rep., 631.)

*Same—Payment of notes to indorsee.*

11 (U. S. C. C. A., 1904). The payment to a bank by an insolvent, within four months prior to bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat., 562 [U. S. Comp. St. 1901, p. 3445], which it must surrender under section 57g before proving a claim against the estate. (*In re Geo. M. Hill Co.*, 130 Fed. Rep., 315.)



## OFFSETS—Continued.

## WHEN DEPOSITOR INSOLVENT—continued.

*Same—Payments and new credits—Net result of transactions.*

12 (U. S. C. C. A., 1904). A corporation previous to its bankruptcy had borrowed large sums from a bank, giving its notes therefor, and had also obtained a discount of customers' notes, which it indorsed. The bank had also discounted notes given by the corporation to third persons. Such transactions continued during the four months prior to bankruptcy, the corporation being in fact insolvent, but the bank having no knowledge or notice of such fact. The net result of the transactions during such time was to decrease the corporation's direct indebtedness on its own notes, both those given direct to the bank and those given to third persons, by the excess of payments over new notes given, but to increase its contingent indebtedness on indorsements of customers' notes. *Held*, that the latter should not be considered in determining the amount of preferences received by the bank, which must be surrendered under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat., 560 [U. S. Comp. St. 1901, p. 3443], as a condition to its proving a claim against the estate, since the discounting of the customers' notes which were the bankrupt's property did not increase its estate, but that the excess of payments over new credits on both the other items of direct indebtedness, taken together, constituted a preference, which must be surrendered. (Ib.)

## ORGANIZATION.

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## ORGANIZATION--Continued.

## IN GENERAL.

*When national bank becomes corporation.*

- 1 (Md.). A national bank does not become a corporation until the articles of association and the organization certificate are filed with the Comptroller of the Currency pursuant to the United States Revised Statutes, sections 5133-5136. (*Regester v. Medcalf*, 71 Md., 528.)

*Right to adopt any name.*

- 2 (U. S. C. C., 1881). There is nothing in the national banking act to prevent a national banking association from adopting any name it pleases, subject to the approval of the Comptroller of the Currency. (*Third National Bank of Baltimore v. Teal*, 5 Fed. Rep., 503.)

*Right to word "national."*

- 3 (Ala.). The prohibition in section 5243 of the national banking act against the use of the word "national" by banking concerns not organized under said act does not apply to building and loan associations. (*Lomb v. Pioneer Building and Loan Company*, 106 Ala., 591.)
- 4 (Ill.). The national banking act prohibits the use of the word "national" as part of the name of all banks not organized under said act. (*People v. National Savings Bank*, 129 Ill., 618.)

## PRESUMPTION OF ORGANIZATION AND EVIDENCE OF CORPORATE EXISTENCE.

*Presumption from use of name.*

- 1 (Ala., 1896). A bank using as a title the name of a national bank will be presumed to have been duly organized as such under the national banking act. (*Slaughter v. First National Bank*, 109 Ala., 157.)

*When not required to prove their incorporation.*

- 2 (Colo. Appls., 1892). National banking associations are not foreign corporations within the Colorado rule of practice requiring foreign corporations, under a general denial, to prove their incorporation. (*Hummel v. First National Bank of Central City*, 32 Pac. Rep., 72; 2 Colo. App., 571.)

*The fact that a note is made payable at a bank not conclusive evidence that bank is a corporation.*

- 3 (Mass. Sup., 1871). In an action by a national bank against the maker of a promissory note, the fact that the note is made payable at the plaintiff bank is not conclusive evidence that such bank is a corporation. (*Hungerford National Bank v. Van Nostrand*, 106 Mass., 559; 1 N. B. C., 589.)

*Proof of organization—Comptroller's certificate.*

- 4 (U. S. Sup. Ct., 1876). In a suit against the association or its shareholders the certificate of the Comptroller is conclusive as to the completeness of the organization. (*Casey v. Galli*, 94 U. S., 673.)
- 5 (U. S. Sup. Ct., 1890). A certificate signed by the Deputy Comptroller of the Currency as "Acting Comptroller of the Currency" is a sufficient certificate by the Comptroller of the Currency within the requirements of Revised Statutes, par. 5154. (*Keyser v. Hitz*, 133 U. S., 138.)
6. A copy of the organization certificate of a national bank, with the certificate and seal of the Comptroller attached, is sufficient proof of its incorporation.  
(Ala., 1890) *Hanover National Bank v. Johnson*, 90 Ala., 549;  
(Minn.) *First National Bank of Memphis v. Kidd*, 20 Minn., 234.
7. In an action by a national bank on a note, where the existence of the corporation is denied, the certificate of the Comptroller of the Currency, under section 22 of the national banking act, that the association had complied with the law and was authorized to do banking business was competent evidence, and in connection with proof that the association had done banking business for several years and the

## ORGANIZATION—Continued.

## PRESUMPTION OF ORGANIZATION AND EVIDENCE OF CORPORATE EXISTENCE—continued.

fact that the note was in terms payable at the bank makes a prima facie case.

(Ill., 1878) *Mix v. National Bank of Bloomington*, 91 Ill., 20; 2 N. B. C., 232;

(Mass.) *Merchants' National Bank of Bangor v. Glendon*, 120 Mass., 97.

8. The certificate of the Comptroller of the Currency that an association has complied with all the provisions required to be complied with before commencing the business of banking is admissible in evidence upon a plea of nul tiel corporation; and such certificate, together with proof that the association has been acting as a national banking association for a long time, is amply sufficient evidence to establish, at least prima facie, the existence of the corporation.

(Ill., 1878) *Mix v. The National Bank of Bloomington*, 91 Ill., 20; 2 N. B. C., 232;

(Mass.) *Merchants' National Bank of Bangor v. Glendon*, 120 Mass., 97.

- 9 (Mass., 1873). A national bank brought an action, describing itself as "The Washington County National Bank, a corporation duly established by law, and doing business in Greenwich, in the State of New York," and to prove its corporate existence introduced an organization certificate of "The Washington County National Bank of Greenwich, to be located in the town of Greenwich, county of Washington and State of New York," and a certificate of the Comptroller of the Currency that "The Washington County National Bank of Greenwich, in the county of Washington and State of New York," had been duly organized. *Held*, that in the absence of the evidence of the existence at Greenwich of another bank named "The Washington County National Bank of Greenwich" the evidence would warrant the inference of the plaintiff's due organization. (*Washington County National Bank v. Lee*, 112 Mass., 521.)

- 10 (Mass. Sup., 1874). Under the national banking act a copy of the certificate of the organization of a United States bank, which is certified by the Comptroller of the Currency and authenticated by his seal of office, is competent evidence in a State court. (*Tapley v. Martin*, 116 Mass., 275; 1 N. B. C., 611.)

- 11 (Mass. Sup., 1874). A certificate by the Comptroller of the organization of a national bank, when filed, becomes a public record and may be proved by an authenticated copy. (*Ib.*)

- 12 (Mich. Sup., 1869). In an action by "The West River National Bank of Jamaica, Vermont," *held*, that the certificate of the Comptroller of the Currency of the existence of a corporation under the name of "The West River National Bank of Jamaica," described as located in the town of Jamaica, Vt., was admissible under the general issue for the purpose of proving the plaintiff's corporate existence. (*Thatcher v. West River National Bank*, 1 N. B. C., 622; 19 Mich., 196.)

- 13 (Mich. Sup., 1869). It is no objection to the admission in evidence of the certificate of the organization of a national bank that the notary before whom it was acknowledged was one of the shareholders of the bank. The Comptroller's certificate of compliance with the act of Congress removes any objection which otherwise might have been made to the evidence on which he acted. (*Ib.*)

- 14 (N. Y., 1872). The fact of the incorporation of a national bank is established by evidence of the de facto existence thereof, together with a copy of the organization certificate and of the Comptroller's certificate of authority to do business under his seal. (*Merchants' Exchange Nat. Bank v. Cardozo*, 35 N. Y. Sup. Ct., 162.)

- 15 (S. Dak. Sup., 1900). Under section 5169, Revised Statutes United States, which authorizes the Comptroller of the Currency to issue a certificate to an association lawfully entitled to commence a banking business, that such association has complied with all the provisions

## ORGANIZATION—Continued.

## PRESUMPTION OF ORGANIZATION AND EVIDENCE OF CORPORATE EXISTENCE—continued.

required by law before commencing such business, and that it is authorized to commence business, such certificate is conclusive evidence of the incorporation of the association to which it is issued. (*Citizens' Nat. Bank of Watertown v. Great Western Elevator Co.*, 82 N. W. Rep., 186; 13 S. Dak., 1.)

- 16 (Wash. Sup., 1896). The Comptroller's certificate of organization is competent evidence tending to prove the incorporation of a national bank. (*National Bank of Commerce of Tacoma v. Galland*, 45 Pac. Rep., 35; 14 Wash., 502.)

## ALLEGATION OF ORGANIZATION AND PLACE OF BUSINESS.

*Allegation of organization.*

- 17 (U. S. C. C., 1881). The declaration described the plaintiff as "The Third National Bank of Baltimore." *Held*, on demurrer, that this was not equivalent to an averment that the plaintiff was a banking association established in the district of Maryland, nor that it was established under the law of the United States providing for national banking associations. *Held, also*, that the declaration was demurrable for want of an averment that the plaintiff was a corporation. (*Third Nat. Bank of Baltimore v. Teal*, 5 Fed. Rep., 503.)

*Allegation of place of business.*

- 18 (N. Y. Super., 1888). The complaint alleged that the plaintiff is a corporation organized under the national banking act of the United States; that defendant made his promissory note for \$5,000 payable to the plaintiff at said bank for value received, with interest, and containing an agreement which recites that the defendant "having deposited with the bank as collateral security" a certain certificate of stock, "giving the plaintiff full power in case of default in the payment of the note at maturity to sell the stock at private or public sale and apply the proceeds to the payment of the note;" that the note was not paid at maturity, and that the stock has not been sold or the lien foreclosed, and demands judgment for \$5,000, and that the lien upon the stock be foreclosed, etc. *Held*, that the complaint alleges a good cause of action. The complaint alleged that the plaintiff had done business in Buffalo, N. Y., upward of ten years, and the name "Farmers and Mechanics' National Bank of Buffalo" is recited in the complaint. *Held*, that there was sufficient evidence to fix the location at Buffalo, N. Y., under Code Civil Procedure, section 1775. (*Farmers and Mechanics' National Bank of Buffalo v. Rogers*, 3 N. B. C., 683; 1 N. Y. S., 757.)

*Parol evidence of organization; de facto existence.*

- 19 (Wash., 1893). In an action by a national bank plaintiff may prove that it is a corporation de facto by parol evidence; that it is carrying on a general banking business as a national bank, authorized by the general laws of the United States, under the name by which it has sued, the court taking judicial notice of such laws. (*Yakima National Bank v. Knipe*, 33 P., 834; 6 Wash., 348.)

*Provisions of national banking act not derogatory of State statutes.*

- 20 (Tex. App., 1880). The provisions of the national banking act as to the proof of the organization of national banks are not derogatory of State statutes. (*First Nat. Bank v. Randall*, 1 W. and W. Civ. Cas., Ct. App., paragraph 972.)

## ESTOPPEL AS TO VALIDITY OF ORGANIZATION.

1. A shareholder against whom an action has been brought to enforce his statutory liability is estopped from denying the existence or validity of the corporation.

(U. S. Sup. Ct., 1876) *Casey v. Galli*, 94 U. S., 674;  
(D. C., 1886) *Keyser v. Hitz*, 82 Mackey, 473.

## ORGANIZATION—Continued.

## ESTOPPEL AS TO VALIDITY OF ORGANIZATION—continued.

- 2 (Ky. Appls., 1870). The organization of a national bank under the national banking act may be put in issue by a party who has not estopped himself. But a party who has accepted as payee a promissory note payable at a banking institution which the parties style a national bank, and has sold and transferred the note to such banking institution, can not be allowed to raise that issue by merely averring want of knowledge or information sufficient to form a belief as to whether such institution is a body corporate, etc. (*Huffaker v. National Bank of Monticello*, 1 N. B. C., 504; 12 Bush., 287.)
- 3 (Ill.). A stockholder in a de facto national bank, who has participated in its transactions as such and received dividends, is estopped from denying the legality of the incorporation. (*Wheelock v. Kost*, 77 Ill., 296.)
- 4 (Nebr. Sup., 1898). One who subscribes for and receives share of a national bank is estopped from denying the validity of its incorporation. (*Davis Estate v. Watkins*, 76 N. W. Rep., 575; 56 Nebr., 288.)
- 5 (N. Y. Sup., 1875). One accustomed to deal with a national bank as such, and who so deals with it in respect to a promissory note, is estopped from denying the incorporation of the bank in an action on the note. (*National Bank of Fairhaven v. The Phenix Warehousing Company*, 1 N. B. C., 784; 6 Hun., 71.)
- 6 (N. Y., 1867). In action by a national bank on a draft discounted for defendant the latter may deny plaintiff's existence as a corporation. (*Bank of Metropolis v. Orcutt*, 48 Barb., 256.)

## CONTRACTS DURING ORGANIZATION.

- 1 (U. S. Sup. Ct., 1897). By section 5136 of the Revised Statutes a contract of lease, at a large rent, of an office to be occupied "as a banking office, and for no other purpose," for the term of five years, determinable at the end of any year by either party, executed by a national bank as lessee, after having duly filed its articles of association and organization certificate with the Comptroller of the Currency, but not having been authorized by him to commence the business of banking, is void, can not be made good by estoppel, and will not support an action against the bank to recover anything beyond the value of what it has actually received and enjoyed. (*McCormick v. Market National Bank*, 165 U. S., 538.)
- 2 (U. S. Sup. Ct., 1897). In an action against a national bank upon a contract, each party relied on section 5136 of the Revised Statutes, by which a national bank, upon filing its articles of association and organization certificate with the Comptroller of the Currency, becomes a corporation, with power "to make contracts" and other corporate powers, but is prohibited to "transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The defendant relied on the prohibition. The plaintiff relied on the exception to the prohibition, and also contended that, under the general power to make contracts, the contract sued on was valid as between the parties, even if contrary to the prohibition. *Held*, that a judgment for the defendant in the highest court of the State might be reviewed by this court on writ of error. (Ib.)
- 3 (U. S. Dist. Ct., 1889). Whatever the terms of an agreement, being made before the date of the drawee bank's certificate of authorization, it is invalid under Revised Statutes United States, section 5136, providing that no banking association "shall transact any business except such as is incidental and necessarily preliminary to its organization,

## ORGANIZATION—Continued.

## CONTRACTS DURING ORGANIZATION—continued.

until it has been authorized by the Comptroller of the Currency to commence the business of banking." (*Armstrong v. Second Nat. Bank of Springfield*, 38 Fed. Rep., 883.)

- 4 (U. S. C. C., 1890). Under Revised Statutes United States, section 5136, providing that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller to commence the business of banking, correspondence between one bank and a person who became the president of a bank afterwards formed can not constitute an agreement controlling the business between the banks, but may be referred to in connection with other evidence to show what was their understanding. (*First Nat. Bank of Wellston v. Armstrong*, 42 Fed. Rep., 193.)
- 5 (Ill.). When bonds are especially deposited with an old bank and a national bank is organized therefrom and the cashier of the new bank recognizes its possession of such bonds by paying interest on the same, the national bank will be held liable for such bonds. (*Monmouth First Nat. Bank v. Strang*, 138 Ill., 347.)
- 6 (Tex.). An agreement made by a cashier of a national bank prior to its organization does not bind it unless such agreement is ratified after the organization is perfected under the national banking act. (*McDonough v. National Bank of Houston*, 34 Tex., 309.)

## PLACE OF BUSINESS.

- 1 (U. S. Sup. Ct., 1870). The provisions requiring "the usual business" of the association to be transacted "at an office or banking house in the place specified in its organization certificate" must be construed reasonably, and a part of the legitimate business of the association which can not be transacted at the banking house may be done elsewhere. (*Merchants' National Bank v. State National Bank*, 10 Wall., 604.)
- 2 (U. S. C. C.). Although the general business of a national banking association is to be transacted at its place of business, yet, if the association is fully advised of the facts and does not object, and there is no fraud, its officers, when acting within the general scope of their authority, may bind it by acts done at another place. (*Burton v. Burley*, 9 Biss., 253.)
- 3 (U. S. C. C., 1878). A national bank located in New Jersey, for the convenience of persons in Philadelphia, kept a clerk in that city who received deposits. *Held*, that the bank did not become located in Philadelphia, so as to be liable to taxation. (*National State Bank of Camden v. Pierce*, 18 Albany Law Journal, 16; 2 N. B. C., 177.)
- 4 (U. S. Dist. Ct., 1889). Under Revised Statutes, section 5190, providing that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate," a national bank can not make a valid contract for the cashing of checks upon it at a different place from that of its residence, through the agency of another bank. (*Armstrong v. Second National Bank of Springfield*, 38 Fed. Rep., 883.)
- 5 (Ill. Sup., 1896). By the provisions of Revised Statutes United States, section 5134, subsection 2, requiring an association formed for the purpose of conducting a national bank to designate in its organization certificate "the place where its operations of discount and deposits are to be carried on," the town or city is meant, and not the office or building. (61 Ill. App., 33, affirmed; *McCormick v. Market National Bank of Chicago*, 44 N. E., 381; 162 Ill., 100.)
- 6 (Ky. App., 1896). A bank created under the national banking act of the United States is not within Revised Statutes, section 571, which

## ORGANIZATION—Continued.

## PLACE OF BUSINESS—continued.

provides that "all corporations, except foreign insurance companies formed under the laws of this or any other State," shall at all times have a place of business in the State, and that no corporation shall do business in the State until it shall have filed a statement designating the location of its office and the name of its agent. (First Nat. Bank v. Commonwealth, 33 S. W. Rep., 1105.)

- 7 (N. Y. Sup., 1875). National banking associations located outside of a State are subject to its restraining acts prohibiting all corporations not authorized by the law of the State from keeping therein offices for the purpose of discount and deposit. (National Bank of Fairhaven v. The Phoenix Warehousing Company, 6 Hun, 71.)

## CONSOLIDATION OF NATIONAL BANKS.

- 1 (Tex. Civ. App., 1900). Where a national bank consolidated with another national bank, taking all the assets and assuming all the liabilities of the latter bank, it, in effect, became a new corporation, whose shareholders were the shareholders of each corporation before consolidation; and hence stockholders of the first bank had no right to the new shares brought in which increased the capital stock, since this would unjustly deprive the stockholders of the other bank of their rights and property without compensation. (Bonnet v. First Nat. Bank of Eagle Pass, 60 S. W., 325; 24 Tex. Civ. App., 613.)
- 2 (Tex. Civ. App., 1900). The national-bank act (Rev. Stat. U. S., sec. 5223), providing that associations winding up their business for the purpose of consolidation with another association shall not be required to deposit, etc., authorizes consolidation of banks, and the consolidation of two national banks with the approbation of the Comptroller of the Currency, whereby one contracted to assume the liabilities of the other, and issued its own increased shares to the stockholders of the first bank, was not ultra vires and void. (Ib.)

## CONVERSION OF BANKS ORGANIZED UNDER STATE LAWS INTO NATIONAL BANKS.

## IN GENERAL.

*Conversion authorized by section 5154, Revised Statutes United States.*

- 1 (U. S. Sup. Ct., 1876). No authority other than that conferred by act of Congress is necessary to enable any State bank to become a national banking association. (Casey v. Galli, 94 U. S., 673.)
- 2 (U. S. Sup. Ct., 1876). No authority from a State is necessary to enable a State bank to become a national bank. (Casey v. Galli, 94 U. S., 673; 1 N. B. C., 142.)

*Conversion of savings banks into national banks.*

- 3 (U. S. Sup. Ct., 1890). Under the proviso in the act of 1876 in relation to savings banks in the District of Columbia, such savings banks may convert themselves into national banks. (Keyser v. Hitz, 133 U. S., 138.)

*Old officers continue after conversion.*

- 4 (R. I.). When a State bank is converted into a national banking association all of the directors at the time will continue to be directors of the association until others are appointed or elected, though some of them may not have joined in the execution of the articles of association and organization certificate. (Lockwood v. The Mechanics' National Bank, 9 R. I., 308.)
- 5 (R. I.). But even were the oath required, a majority of all who were directors at the time of the conversion, and not merely a majority of those who take the oath, are necessary to constitute a quorum. (Ib.)

## ORGANIZATION—Continued.

## CONVERSION OF BANKS ORGANIZED UNDER STATE LAWS INTO NATIONAL BANKS—Continued.

## POWER OF STOCKHOLDERS TO EFFECT CONVERSION WHEN STATE BANK HAS NONVOTING STOCK—RIGHTS OF HOLDERS OF NONVOTING STOCK.

- 1 (Conn., 1867). If the State bank has voting and nonvoting stock the nonvoting stock can not participate in the voting upon the change of organization and the action of the voting stockholders transfers the nonvoting stock. If the voting stockholders acted under the act (Conn.) of 1863, the nonvoting stockholders had no right to elect to become stockholders in the national bank, but were entitled to a full share of the assets and could not be compelled to accept par value of their stock with interest. (*State v. Phoenix Bank*, 34 Conn., 205.)
- 2 (Conn., 1867). The act (Conn.) of 1864 provided that nonvoting stockholders of a State bank should be included as stockholders in the new national bank, if they, within a prescribed time from receipt of notice required by statute from the bank of its election, gave written notice of their desire to be so included; otherwise such stockholders to be excluded. *Held*, that where an election was made without pursuing strictly and technically the provision of the act, the new institution can not exclude from becoming stockholders nonvoting stockholders of the old corporation on the ground that they have not complied technically with the act. (*State v. Hartford Nat. Bank*, 34 Conn., 240.)

## RIGHTS AND OBLIGATIONS OF CONVERTED BANK.

- 1 (U. S. Sup. Ct., 1892). The conversion of a State bank into a national bank, with a change of name, under the national-bank act does not affect its identity or its rights to sue upon liabilities incurred to it by its former name. (*Michigan Insurance Bank v. Eldred*, 143 U. S., 293.)
- 2 (U. S. Sup. Ct., 1891). The provisions in the statute in New York of April 11, 1859 (Laws of 1859, chap. 236), as to the redemption of circulating notes issued by a State bank, and the release of the bank if the notes should not be presented within six years, do not apply to a State bank converted into a national bank under the act of March 9, 1865, and not "closing the business of banking." (*Metro-politan National Bank v. Claggett*, 141 U. S., 520.)
- 3 (U. S. Sup. Ct., 1891). The conversion of a State bank in New York into a national bank, under the act of the legislature of that State of March 9, 1865 (N. Y. Laws of 1865, chap. 97), did not destroy its identity or its corporate existence, nor discharge it as a national bank from its liability to holders of its outstanding circulation, issued in accordance with State laws. (*Ib.*)
4. When the business and funds of a bank pass to another the successor is liable for the deposits in the former.
  - (Iowa) *Hopper v. Moore*, 42 Iowa, 563;
  - (Mo.) *Evans v. Exchange Bank*, 79 Mo., 182;
  - (Mo.) *Hughes v. School Dist.*, 72 Mo., 643;
  - (Ohio) *Citizens' Bank v. Blakesly*, 42 Ohio St., 645.
- 5 (Md.). A State law authorizing national banking associations which have been converted from State banks to use the name of the original corporation for the purpose of prosecuting and defending suits is not in conflict with the national banking law, and therefore proceedings based upon a judgment obtained before the conversion may be instituted by such association in its former corporate name. (*Thomas v. Farmers' Bank of Maryland*, 46 Md., 43.)
- 6 (Mass. Sup., 1875). A State bank paid its president money to reimburse him for money which he falsely represented he had paid to its creditor. The State bank was afterwards changed to a national bank, and the creditor recovered judgment against it for his debt. *Held*,



## ORGANIZATION—Continued.

## CONVERSION OF BANKS ORGANIZED UNDER STATE LAWS INTO NATIONAL BANKS—Continued.

## RIGHTS AND OBLIGATIONS OF CONVERTED BANK—continued.

- that it could maintain an action against the president for money had and received, although the State statute provided that the State bank should be continued a body corporate for three years for the purpose of prosecuting and defending suits, closing its concerns, and conveying its property. (*Atlantic National Bank v. Harris*, 118 Mass., 147; 2 N. B. C., 454.)
- 7 (Mo.). The bank of the State of Missouri, by reorganizing under the act of Congress as a national bank, lost none of its assets and escaped none of its liabilities. (*Coffey v. National Bank of Missouri*, 46 Mo., 140.)
  - 8 (N. Y. Appls., 1884). A national bank changed from a State bank may maintain an action on a continuing guaranty for loans held by it before the change—for loans both before and after the change. (*City National Bank of Poughkeepsie v. Phelps*, 97 N. Y., 44; 49 Am. Rep., 513; 3 N. B. C., 627.)
  - 9 (N. Y. Appls., 1884). Where a State bank has been converted into a national banking association it may enforce all contracts made with it while a State corporation. (Ib.)
  - 10 (Ohio). A national banking association, organized as the successor of a State bank, may take and hold the assets of the bank whose place it takes, though there was not in form a conversion from a State to a national corporation, but the organization of a new corporation. (*Bank v. McIntyre*, 40 Ohio St., 528.)
  - 11 (Pa.). A national bank organized by the conversion of a State bank is not deprived of any of the property and is not relieved of any of the liabilities of the State bank. (*Kelsey v. Nat. Bank of Crawford*, 69 Pa. St., 426.)
  - 12 (Pa.). And it is liable, after the conversion, for all the obligations of the old institution. (Ib.)
  - 13 (Pa.). One who is indebted to a national bank organized from a State bank can not set off against such debt the circulating note of the State bank purchased after the act of insolvency. (*Thorpe v. Wegefrath*, 56 Pa. St., 82.)

## RIGHTS OF STOCKHOLDERS, HOW AFFECTED.

- 1 (Pa.). The conversion of a State bank into a national bank, under the act of Congress of June 3, 1864, did not work an annihilation or dissolution, but only a change of the bank. (*Maynard v. Bank*, 1 Brewster, 483.)
- 2 (Pa.). Such change does not addeem a residuary legacy in certain shares of the bank, limited upon a life estate in such shares, which is to become an absolute one in case the bank should pay off or refund its stock by reason of the expiration of its charter or from any other cause. The change is not equivalent in law to a paying off in fact, and the residuary legatee is entitled to the stock, on the death of the legatee, for life. (Ib.)

## REORGANIZATION.

## REORGANIZATION AS NATIONAL BANK UNDER ANOTHER NAME—RIGHTS OF STOCKHOLDERS.

- 1 (Ill., 1888). A national bank went into voluntary liquidation. All the stockholders but one united in organizing a new national bank under a different name. He knew that the greater part of the assets were sold to the new bank, and he accepted dividends from nearly all such assets. *Held*, (1) that he had no right to share in the earnings of the

## ORGANIZATION—Continued.

## REORGANIZATION—Continued.

## REORGANIZATION AS NATIONAL BANK UNDER ANOTHER NAME—RIGHTS OF STOCKHOLDERS—continued.

bank; (2) the old bank had no good will to sell independent of the value of the unexpired lease of its banking house. (*First National Bank of Centralia v. Marshall*, 26 Ill. App., 440; 3 N. B. C., 401.)

## REORGANIZATION OF NATIONAL BANK AS STATE BANK.

- 1 (Mich., 1895). Where a national bank is reorganized as a State bank, the State bank taking over all the assets and assuming all the liabilities of the national bank and continuing the same officers, the State bank retains the identity of the national bank and may enforce a written authority for the indorsement of commercial paper held by the national bank. (*First Commercial Bank v. Talbert*, 103 Mich., 625.)

## CORPORATE EXISTENCE.

*No change in the status of obligations of bank whose charter has been extended.*

- 1 (Conn.). Where a national bank is rechartered and its existence extended under the provisions of the law of 1882, there is no change in the status or legal effect or power of the corporation, and all of the obligations due to and from it have the same force and effect as before such extension. (*National Exchange Bank v. Gay*, 57 Conn., 224, 234.)
- 2 (N. Y.). Where a national bank continues its existence under the act of Congress of 1882, the bank is not relieved from liability on a bond given previously as security for money deposited; and the sureties on such bond are not discharged. (*People v. Backus*, 117 N. Y., 196.)

*Officers may be elected for the purpose of effecting liquidation after the expiration of the term of the charter.*

- 3 (Mass.). Under the act of Congress, July 12, 1882, extending for the purpose of liquidation the franchises of such national banking associations as do not extend the periods of their charters, and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation. But after the expiration of the term of its charter the stock of such an association is not transferable so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder, is ineligible as a director under Revised Statutes, section 5145. (*Richards v. Attleboro National Bank*, 148 Mass., 187; 3 N. B. C., 495.)

*Corporate existence continues until business is settled.*

- 4 (Minn., 1898). A national bank, after the expiration of the period for which it was chartered, continues to exist as a person in law, and may sue and be sued until its business is completely settled. (*Farmers' Nat. Bank of Owatonna v. Backus*, 77 N. W. Rep., 142; 74 Minn., 264.)

*Extension of charter does not change identity of bank.*

- 5 (N. J., 1894). The identity of a national bank is not affected by the extension of its term of existence. (*Trustees of First Presbyterian Church v. National State Bank of Newark*, 29 A., 320; 57 N. J. L., 27.)

*Officers of a bank whose charter has expired can be compelled to exhibit books, etc., to stockholders.*

- 6 (N. Y.). The supreme court has power, in its discretion, to require the officers of a national bank in process of liquidation, on expiration of its charter by limitation, to exhibit books, papers, and assets of the bank to the stockholders, and to allow them to examine and take extracts therefrom. (*Tuttle v. Iron Nat. Bank of Plattsburg*, 62 N. E. Rep., 761; 170 N. Y., 9.)

## ORGANIZATION—Continued.

## CORPORATE EXISTENCE—Continued.

*Revised Statutes, section 5242, not repealed by act of July 12, 1882.*

- 7 (N. Y.). Revised Statutes United States, section 5242, was not repealed by implication by act of Congress July 12, 1882 (22 Stat. L., 102), with reference to the extension of succession of national banking associations, and declaring that they shall continue as the same association, provided that jurisdiction of suits by or against them, except between them and the United States, shall be the same as for suits by or against other banks not organized under any law of the United States and which do, or might do, banking business where such national bank may be doing business when such suit may be begun, and declaring all laws inconsistent therewith repealed. (*Van Reed v. People's Nat. Bank*, 73 N. Y. S., 514.)

*When committee appointed to appraise shares can correct mistake.*

- 8 (Pa.). The committee provided for by the fifth section of act of Congress of July 12, 1882, to appraise the national-bank shares of shareholders who do not assent to amendments to the articles of association may correct a mistake made by them in their appraisal within thirty days therefrom. (*First National Bank of Clarion v. Brennenman's Executors*, 114 Penn. St., 315; 3 N. B. C., 755.)

## PASS BOOKS.

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*Pass book a receipt.*

- 1 (Kans. Sup., 1894). A pass book given by a bank to a depositor is not a written contract, but is a mere receipt for the amount deposited; and an action thereon is barred by the three-year limitation. (*Talcott v. First National Bank of Larned*, 36 P., 1066; 53 Kans., 480.)

## PLACE OF BUSINESS. (See ORGANIZATION.)

## PLEADING AND PRACTICE.

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*What considered on appeal, special finding.*

- 1 (U. S. Sup. Ct., 1890). Where the case is tried by the circuit court without a jury, and it makes a special finding of facts, with conclusions of law, alleged errors of fact are not, on a writ of error, subject to revision by this court, if there was any evidence on which such findings could be made. (*Hathaway v. First National Bank of Cambridge*, 134 U. S., 494.)
- 2 (U. S. Sup. Ct., 1890). Where the circuit court finds ultimate facts which justify the judgment rendered, its refusal to find certain specified facts, and certain propositions of law based on those facts, will not be reviewed by this court, on a writ of error, if they were either immaterial facts or incidental facts, amounting only to evidence bearing on the ultimate facts found. (*Ib.*)
- 3 (U. S. C. C. A., 1896). When the finding in the circuit court involves mixed questions of law and fact, and is general in its form, nothing is open to review in the circuit court of appeals except the rulings made in the progress of the trial, the findings being conclusive as to the facts. (*Humphreys v. Third National Bank of Cincinnati, Ohio*, 75 Fed. Rep., 852.)
- 4 (U. S. C. C. A., 1896). When a jury is waived in the circuit court, a party wishing to raise any question of law upon the merits in the court above should request special findings of fact, framed like the verdict of a jury, and reserve his exceptions to these special findings if he deems them not sustained by the evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. (*Ib.*)

*Mandamus.*

- 5 (U. S. Sup. Ct., 1900). A national bank was closed by order of the Comptroller of the Currency and a receiver appointed. An assessment was made upon the holders of stock. Overton and Hoffer were among those who were assessed, and payment not having been made, suit was brought against them. Service was made upon H., but not upon O., who was very ill, and who died without service having been made upon him. He left a will, under which J. P. O. was duly appointed his executor. The executor was summoned into the suit by a writ of scire facias. A motion was made to set aside the scire facias and the attempted service thereof, which motion was granted. The executor being substituted in the place of the deceased as defendant, the court decided that it had acquired no jurisdiction over the deceased and could acquire none over his executor. Thereupon the receiver applied to this court for a writ of mandamus to the judges of the circuit court of the United States for the ninth circuit, commanding them to take jurisdiction and proceed against J. P. O. as executor of the last will and testament of O., deceased, in the action brought by the receiver to recover the assessments.

## PLEADING AND PRACTICE—Continued.

*Held:* (1) That mandamus was the proper remedy, and the rule was made absolute; (2) that the action of the circuit court in setting aside the scire facias was here for review; (3) that scire facias was the proper mode for bringing in the executor, and under Revised Statutes, section 955, it gave the court jurisdiction to render judgment against the estate of the deceased party in the same manner as if the executor had voluntarily made himself a party. (*In re Conaway, Receiver*, 178 U. S. Rep., 421.)

*Office of cross complaint.*

6 (U. S. C. C. A., 1895). A cross bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross complainant over the subject-matter of the original bill. If its purpose is other than this, it is not a cross bill. A cross bill may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill and must be dismissed, because there can not be two original bills in the same case. (*Stuart v. Hayden*, 72 Fed. Rep., 402.)

*Complaint held multifarious.*

7 (U. S. C. C., 1896). Complainant's bill sought to subject defendant to liability for an indebtedness of a railroad company to complainant on four grounds, viz: That defendant was the owner of stock in the railroad company upon which a part of the subscription, exceeding the railroad company's indebtedness, was unpaid; that, through various transactions in the issue, cancellation, and reissue of stock, and the purchase of shares owned by other parties with funds of the railroad company, there had been a misappropriation of the railroad company's property applicable to the payment of its debts, for which defendant was responsible; that defendant, and others confederating with him, had caused real estate of the railroad company to be conveyed to defendant without consideration; that defendant, combining with others, had misrepresented the financial condition of the railroad company, thereby inducing complainant to loan it money, which he had lost. *Held*, that, though the first and second grounds of liability, growing out of the defendant's connection with the railroad company as an officer and stockholder therein, might be united, the third and fourth grounds had no legal connection with the former, and the bill was multifarious. (*First National Bank of Sioux City v. Peavey*, 75 Fed. Rep., 154.)

*Parties.*

8 (U. S. C. C. A., 1897). To a suit brought against a bank to recover money deposited with it by a corporation, which plaintiffs claimed acted as their agent in making the deposit, and which deposit the bank had applied to the payment of a debt to it from the depositor, the corporation making the deposit was a proper, and even necessary, party; but as, on the rendition of the decree in favor of complainants, that company appeared entitled to no right or relief, and was not subjected to any liability, a dismissal as to it was proper. (*Union Stock Yards National Bank v. Moore et al.*, 79 Fed. Rep., 705.)

9 (Me. Sup., 1878). A national bank, having discounted a note for an indorser, and having sued the maker, may receive payment from the indorser and assign the note and the suit to the indorser, and he may prosecute it in the name of the bank for his own benefit against the maker. (*Ticonic National Bank v. Bagley*, 68 Me., 249; 2 N. B. C., 245.)

*Removal, diligence.*

10 (U. S. C. C., 1884). The law requires diligence on the part of the applicant for removal. He can not remain passive, and then after the lapse of several terms of the State court make an application for

## PLEADING AND PRACTICE—Continued.

removal. (National Bank of Clinton, Iowa, *v.* Dorset Pipe and Paving Co., 20 Fed. Rep., 707.)

- 11 (U. S. C. C., 1884). Court can not take judicial notice of matters that do not appear in the record. (Ib.)

*Joinder of causes of action.*

- 12 (U. S. C. C., 1897). A complaint on bills of exchange, filed by the payee against the drawer, may be amended by joining an additional cause of action based on defendant's promise to pay certain checks of a third party, upon which plaintiff had advanced the amount therein called for, since this is kindred in character to the original causes of action, and might originally have been joined with them. (Bowen *v.* Needles National Bank, 79 Fed. Rep., 49.)

- 13 (N. Y. Super., 1888). Under Code of Civil Procedure, section 484, such actions as were formerly denominated legal or equitable, or both, may be joined in the same complaint. (Farmers and Mechanics' Nat. Bank of Buffalo *v.* Rogers, 3 N. B. C., 683; 1 N. Y. S., 757.)

*Erroneous instructions.*

- 14 (U. S. C. C. A., 1896). Where both parties to an action claim title to land under legal proceedings, those through which defendant derives title being alleged to be fraudulent, it is reversible error to instruct the jury that upon the record evidence the title is vested in the plaintiff, whereas in fact the defendant has the better title unless it is defeated by fraud. (Short et al. *v.* Hepburn, 75 Fed. Rep., 113.)

- 15 (U. S. C. C. A., 1896). In an action involving the validity of a title claimed by defendants to have been acquired under attachment and execution against one C, while plaintiff charges that C. was a fictitious person and the deed to him and the proceedings against him were parts of a scheme of his supposed grantor to defraud his creditors, it is error to charge the jury either that if C.'s whereabouts were unknown it would make his title to the property immaterial or that the fact that C. was a fictitious person would entitle the plaintiff to recover irrespective of the circumstances under which defendant acquired his title. (Ib.)

*Bill of discovery.*

- 16 (U. S. C. C., 1888). A bill by a judgment creditor for discovery, showing that when the execution was returned unsatisfied, and when the bill was filed, there was property, within the knowledge of the creditor, subject to levy on execution, fails to show that the legal remedy has been exhausted, and is demurrable. (Merchants' National Bank of Chicago et al. *v.* Sabin et al., 34 Fed. Rep., 492.)

*Discretion of court as to arguments in presence of jury.*

- 17 (Ala., 1895). It is within the discretion of the court to have the jury retire during arguments as to the admissibility of evidence. (Birmingham National Bank *v.* Bradley, 19 So., 791; 108 Ala., 205.)

*Bank's action on note to cashier, allegations.*

- 18 (Ga., 1895). In an action by a bank upon a negotiable note payable to order, the title to which, by appropriate indorsement, has become vested in the name of a person as cashier, the declaration must show that such person is plaintiff's cashier, and that the ownership of the note sued upon is in plaintiff; else it will be demurrable. (Hobbs *v.* Chemical National Bank., 25 S. E., 348; 97 Ga., 524.)

*Agreement to hearing in vacation.*

- 19 (Iowa, 1892). A stipulation that a cause should be "heard" at the place where the judge resided, which was other than that of holding court, coupled with the fact that the evidence was submitted there, that two terms of court were afterwards held before the expiration of the judge's term of office, and that neither party took any steps to have the decision made at either of said terms, although they must have known that it could not otherwise be made by the then judge, except

## PLEADING AND PRACTICE—Continued.

in vacation, amounts to an agreement that it might be made in vacation. (*Babcock v. Wolf*, 28 N. W., 490; 70 Iowa, 676, followed. *Shenandoah National Bank v. Read*, 53 N. W., 96; 86 Iowa, 136.)

*Discretion of court as to filing of affidavits.*

- 20 (Minn., 1896). The court below, after giving the parties ample opportunity to present affidavits on a motion for the appointment of a receiver, did not abuse its discretion in refusing to hear more affidavits, not presented at the proper time. (*Farmers' National Bank of Owatonna v. Backus*, 66 N. W., 5; 63 Minn., 115.)

*Amendment of pleading.*

- 21 (Nebr., 1896). In an action against a bank on a deposit, the bank answered by a general denial. During the trial it undertook to prove payment. Objection being made to the relevancy of the proof, an agreement was made in open court whereby the bank was allowed twenty days to amend its answer "in any manner" with the same effect as if presently filed, and the trial proceeded. The instructions given excluded from the jury the consideration of the issue of payment which was finally tendered by the amended answer, filed after trial, but within the stipulated time. *Held*, that the plaintiff was bound by the terms of his stipulation, and that the judgment must be reversed for failure to submit the issues finally framed to the jury. (*Tecumseh National Bank v. Harmon*, 66 N. W., 1128.)

*Intervention.*

- 22 (Nebr., 1898). A receiver of a corporation, appointed after the commencement of a suit against the corporation, may intervene in such action to defend the rights of the corporation. (*Andrews v. Steele City Bank et al.*, 1 Banking Cases, 76; 57 Nebr., 173.)

*Creditor's action.*

- 23 (Nebr. Sup., 1900). A judgment creditor, after an execution has been issued and returned nulla bona, may maintain a suit in equity to make his judgment effective as a lien upon the land by removing obstructions calculated to make an execution sale unproductive. (*First National Bank of Plattsmouth v. Gibson et al.*, 3 Banking Cases, 61; 60 Nebr., 767.)
- 24 (Nebr. Sup., 1900). A party who is not prejudicially affected by a judgment or decree can not secure its modification or reversal. (*Ib.*)

*In foreclosure of lien on collaterals.*

- 25 (N. Y. Super., 1889). The complaint alleged that the plaintiff is a corporation organized under the national banking act of the United States; the defendant made his promissory note for \$5,000, payable to the plaintiff, at said bank, for value received, with interest, and containing an agreement which recites that the defendant "having deposited with the bank, as collateral security," a certain certificate of stock "giving the plaintiff full power, in case of default in the payment of the note at maturity, to sell the stock at private or public sale, and apply the proceeds to the payment of the note;" that the note was not paid at maturity, and that the stock has not been sold or the lien foreclosed, and demands judgment for \$5,000 and that the lien upon the stock be foreclosed, etc. *Held*, that the complaint alleges a good cause of action. (*Farmers and Mechanics' National Bank of Buffalo v. Rogers*, Buff. Super. Ct., 3 N. B. C., 683; 1 N. Y. S., 757.)

*Allegation as to location of bank.*

- 26 (N. Y. Super., 1889). The complaint alleged that the plaintiff had done business in Buffalo, N. Y., upward of ten years, and the name "Farmers and Mechanics' National Bank of Buffalo" is recited in the complaint. *Held*, that there was sufficient to fix the location at Buffalo, N. Y., under Code of Civil Procedure, section 1775. (*Farmers and Mechanics' National Bank of Buffalo v. Rogers*, 3 N. B. C., 683.)

## PLEADING AND PRACTICE—Continued.

- 27 (N. Y. Super., 1889). Although the plaintiff had the right under the agreement to sell the stock without action, he may come into court and ask its direction. (Ib.)

*National bank, when a foreign corporation.*

- 28 (N. Y.). A national banking association is a foreign corporation within the meaning of a State statute requiring corporations created by the laws of any other State or country to give security for costs before prosecuting a suit in the courts of the State. (National Park Bank v. Gunst, 1 Abb. N. C., 292.)

*When judgment on default will be reversed.*

- 29 (Tex. Civ. Appls, 1896). A judgment entered on failure of defendant to appear on trial, an answer being on file reciting that defendants have failed to appear and wholly made default, will be reversed, no evidence appearing in the record, though the judgment further recites that the issues of fact as well as law were submitted to the court. (Hepburn v. Danville National Bank, 34 S. W., 988.)

*Pleading.*

- 30 (Wash., 1896). A complaint in an action on a note alleged its execution, and in a third paragraph alleged that "no part of said sum has been paid, and the same is wholly due;" and the answer admitted the execution of the note, but denied "each and every allegation in paragraph three." *Held*, that the denial was bad, as a negative pregnant. (Columbia National Bank v. Western Iron and Steel Co., 44 P., 145; 14 Wash., 162.)

*Attorneys—Authority—Stipulations.*

- 31 (U. S. C. C., 1904). Where an attorney was employed to defend an action brought by the receiver of a national bank to recover a stock assessment, the attorney had no authority, after judgment in his client's favor, and after the termination of the term of court at which the case was tried, to stipulate that a writ of error should not be prosecuted in such action, but that his client would be bound by proceedings in error in another suit between the receiver and other stockholders to which the client was not a party. (Brown v. Arnold, 127 Fed. Rep., 387.)
- 32 (U. S. C. C., 1904). A proceeding in error, after judgment is a new suit, with regard to which an attorney, employed by one of the parties to represent him at the trial, has no authority to act in the absence of a new employment. (Ib.)

*Judgment—Motion to vacate—Termination of term—Jurisdiction.*

- 33 (U. S. C. C., 1904). A court has no jurisdiction to grant a motion to set aside a judgment, after the termination of the term at which it was rendered, on the stipulation of the attorneys, that the same should abide the event of a writ of error in another cause. (Ib.)

*Equity—Adequate remedy at law.*

- 34 (U. S. C. C., 1904). Where the making of a stipulation between attorneys that a judgment should abide the event of a writ of error in another suit was not denied, though the stipulation had been lost or mislaid, a bill in equity was not maintainable to compel vacation of the judgment on defendant's refusal to comply with the stipulation, since plaintiff had an adequate remedy at law for breach thereof. (Ib.)

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## IN GENERAL.

*Congress is sole judge as to extent of powers which should be conferred on national banks.*

- 1 (U. S. Sup. Ct., 1903). Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks and has the sole power to regulate and control the exercise of their operations. Congress having dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital, and full and adequate provision having been made for the protection of creditors of national banks by requiring frequent reports to be made of their condition, and by the power of visitation of Federal officers, it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the General Government. (*Easton v. Iowa*, 188 U. S., 220.)

*Authority of Federal decisions.*

- 2 (Wis. Sup., 1903). While a State court is bound by the decisions of the United States Supreme Court as to the powers of national banks, the application of such decisions as to the powers of such a bank, as a defense in a case properly brought in the State courts, is to be determined by State decisions. (*Security Natl. Bank of Sioux City, Iowa, v. St. Croix Power Co. et al.*, 94 N. W. Rep., 74; 5 B. C., 560.)

## POWERS—Continued.

## IN GENERAL—continued.

*Incidental powers.*

- 3 (U. S. Sup. Ct., 1891). Under national banking act a national bank can exercise only the powers expressly granted and those necessarily incidental. (*Logan County National Bank v. Townsend*, 139 U. S., 67.)
- 4 (N. Y.). To the enumerated powers of national banking associations are to be superadded all the powers incidental to the business of banking. (*Pattison v. Syracuse National Bank*, 80 N. Y., 82.)
- 5 (N. Y.). The enumeration of banking powers in the national banking act is not significant of an intention to place any special restrictions upon national banks as distinguished from State banks. The enumeration is of the general, not the incidental, powers. (*Ib.*)

*When national bank may borrow money.*

- 6 (U. S. Sup. Ct., 1893). A national bank in certain circumstances may become a temporary borrower of money, yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. (*Western National Bank v. Armstrong*, 152 U. S., 346.)
- 7 (U. S. C. C., 1896). A national bank has power to borrow money on call for the purposes of its business. (*Chemical National Bank of New York v. Armstrong*, 76 Fed. Rep., 339.)
- 8 (U. S. C. C., 1896). The vice-president of a national bank, who is the acting president, may, in conformity with established custom, without special authority from the board of directors, borrow money on behalf of the bank from another bank. (*Western National Bank v. Armstrong*, 14 Sup. Ct., 572; 152 U. S., 346, distinguished.) (*Ib.*)

*Violation of Revised Statutes, section 5208, does not preclude bank from realizing on collateral pledged to secure said checks.*

- 9 (U. S. Sup. Ct., 1892). A violation of the provisions of United States Revised Statutes, section 5208, by a national bank in overcertifying checks does not preclude the bank from enforcing its claim out of collaterals pledged to secure the obligations of the drawer of the checks. (*Thompson v. St. Nicholas National Bank*, 146 U. S., 240.)

*May buy and sell coin.*

- 10 (U. S. Sup. Ct., 1870). The provisions of the national bank act, requiring "the usual business" of the bank to be transacted "at the office or banking house in the place specified in its organization certificate," does not prevent the purchase of coin by one bank at the banking house of another. (*Merchants' Nat. Bank v. State Nat. Bank*, 1 N. B. C., 47; 10 Wall., 604.)

*May sell pledged property.*

- 11 (U. S. Sup. Ct., 1870). As the national currency act of 1864 authorizes banks created under it to buy and sell coin, such bank, having coin in pledge, may sell and assign its special property therein. (*Ib.*)

*May transact no business before authorization.*

- 12 (U. S. C. C., 1890). Under Revised Statutes, section 5136, providing that no banking association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller to commence the business of banking, correspondence between one bank and the person who became the president of a bank afterwards formed can not constitute an agreement controlling the business between the banks, but may be referred to, in connection with other evidence, to show what was their understanding. (*First National Bank of Wellston v. Armstrong*, 42 Fed. Rep., 193.)
- 13 (U. S. Dist. Ct., 1889). Whatever the terms of an arrangement being made before the date of the drawee bank's certificate of authorization, it is invalid under Revised Statutes, section 5136, providing that no bank-

## POWERS—Continued.

## IN GENERAL—continued.

ing association "shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence the business of banking." (*Armstrong v. Second National Bank of Springfield*, 38 Fed. Rep., 883.)

*May have property held in trust by officer.*

- 14 (U. S. C. C., 1895). Where an assignment of a judgment belonging to a bank is made by one of its officers, in its name, to an individual, who, in consideration thereof, transfers property to the bank officer, such transfer constitutes a valid consideration moving to the bank, since a trust results in its favor as to the property transferred to its officer. (*Cox v. Robinson*, 70 Fed. Rep., 760. Affirmed by U. S. C. C. A., 82 Fed. Rep., 277.)

*Officers presumed to have powers publicly assumed.*

- 15 (U. S. C. C., 1895). The officers of a national bank, acting for it, are presumed to have the powers which they assume publicly, with the knowledge and acquiescence of the board of trustees, who are presumed to see what is made apparent before the eyes of the public in the action of their agents. (*Cox v. Robinson*, 70 Fed. Rep., 760.)
- 16 (U. S. C. C. A., 1897). When the directors of a bank permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs, in such manner and for such length of time as to lead innocent persons to make contracts with him, honestly believing that he has the authority he claims, the bank can not repudiate such contracts. (*Cox v. Robinson*, 82 Fed. Rep., 277.)
- 17 (U. S. C. C. A., 1897). A national bank, owner of a judgment for the payment of which defendant was bound, through its vice-president assigned such judgment to defendant, the consideration being the transfer by defendant to the vice-president of another judgment, which the latter had obligated himself individually to pay, but in the interest of the bank. The vice-president had no express authority from the directors to make the assignment, but he was the largest stockholder, a director, and had long been the principal acting officer of the bank, and general manager of its business, exercising the power of transferring its property and indorsing its notes, with the knowledge and acquiescence of the directors, and he was generally reputed in the community to be its owner. *Held*, in an action by the receiver of the bank, that the jury were justified in finding that the vice-president had authority to make the assignment, and that the bank received a consideration therefor. (*Ib.*)

*Unauthorized transfer of judgment.*

- 18 (U. S. C. C., 1895). When a judgment, belonging to a national bank is transferred without collecting it, the presumption is that the transfer is unauthorized. (*Cox v. Robinson*, 70 Fed. Rep., 760.)

*Valid oral agreement by.*

- 19 (U. S. C. C. A., 1901). A national bank may make a binding oral agreement to repay money it borrows, and to pay notes it procures to be discounted. (*Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. Rep., 421.)

*May give bond to secure deposit.*

- 20 (U. S. C. C., 1898). Giving bond to secure funds deposited with it is within the power of a national bank, and sureties on such bond are liable. (*State of Nebraska v. Nat. Bank of Orleans*, 88 Fed. Rep., 947.)

*Rediscount.*

- 21 (U. S. C. C. A., 1897). A national bank has the authority to rediscount its bills receivable. A rediscount by a bank of its bills receivable, though it indorses the same, and becomes contingently liable for their payment, is not a borrowing of money by the bank, but has more the

## POWERS—Continued.

## IN GENERAL—continued.

characteristics of a sale. (*United States Nat. Bank v. First Nat. Bank*, 79 Fed. Rep., 296.)

*Contract to buy assets of another bank not ultra vires.*

22 (U. S. C. C. A., 1899). The fact that a director of a national bank, whose presence was necessary to constitute a quorum at a meeting where, by the action of the directors, in which he participated, a contract by the bank to assume and pay the liabilities of another bank was ratified, was also a stockholder in such other bank, in the absence of any allegation of fraud in the transaction, is not sufficient to render the contract invalid. (*Scofield v. State Nat. Bank of Denver*, 97 Fed. Rep., 282.)

23 (U. S. C. C. A., 1899). A contract by a national bank to assume and pay the liabilities of another bank in consideration of the transfer to it by the other bank of its office furniture and lease and its cash and cash assets, and the further assignment to a trustee for its benefit of bills receivable and securities, is not ultra vires, but is within its powers conferred by statute to conduct a general banking business. (Ib.)

*May take mortgage on chattels.*

24. A national bank may take a chattel mortgage as additional security for a preexisting indebtedness.

(Ill. App.) *Gaar v. Centralia National Bank*, 20 Ill. App., 611;

(Ill. App.) *Barker v. Livingston Co. National Bank*, 30 Ill. App., 591-607;

(Iowa) *Spafford v. First National Bank of Tama City*, 37 Iowa, 181.

*May not make donation.*

25 (Ill.) National banks have no power to make donations of money. They can use the same only for banking purposes. (*McCrory v. Chambers*, 48 Ill. App., 445.)

*May receive deposit to be disbursed on condition.*

26 (Kans. Sup.). The discounting of commercial paper, and the receipt of the proceeds on deposit to disburse to a certain person when a certain service is performed are within the powers of a bank, and such power may be exercised by the cashier or managing officer. (*Kansas National Bank v. Quinton*, 48 P., 20.)

*May empower cashier to employ clerks.*

27 (Mass.). It is not negligence for a bank to intrust its cashier to select and hire and pay out of his salary all the clerks and other servants employed in the banking room, no negligence being shown in the selection of the cashier. (*Smith v. First National Bank of Westfield*, 99 Mass., 605.)

*May buy check.*

28 (U. S. Sup. Ct., 1870). A certified check is not against the policy of the banking act and is a legal and valid investment. (*Merchants' National Bank of Boston v. State National Bank*, 10 Wall., 604.)

29 (Mass.). A national bank may buy a check drawn upon another bank, and whether the check is payable to order or to bearer is immaterial. (*First National Bank of Rochester v. Harris*, 108 Mass., 514.)

30 (S. C.). A draft, with a bill of lading attached thereto and payable to a national bank, by which it is discounted, is a bill of exchange, and a national bank may purchase the same. (*Union National Bank v. Rowan*, 23 S. C., 339; 55 Am. R., 26.)

*May contract to give stock for patronage.*

31 (Nebr.). Where an association has made or ratified a contract to give a person a certain number of the shares of its stock, upon condition that he will continue to do his business with it, and derives the benefit from this contract, the other party may recover of the association

## POWERS—Continued.

## IN GENERAL—continued.

the value of the shares. (*Rich v. State National Bank of Lincoln*, 7 Nebr., 231.)

*May provide real estate necessary for its business.*

32 (N. J., 1894). A national bank empowered by charter to provide necessary real estate for its business may make a contract to prevent the erection of buildings on adjacent land so as to secure light and air for its banking house. (*Trustees of First Presbyterian Church v. National State Bank of Newark*, 29 A., 320; 57 N. J. L., 27.)

*May hold special deposit as security.*

33 (N. Y. Appls., 1878). A national banking association may receive a deposit to be held by it as security for the faithful performance of a contract between the depositor and another. (*Bushnell v. The Chautauqua County National Bank*, 10 Hun, 378.)

*May take married woman as security.*

34 (N. Y. Appls., 1878). An indorsement by a married woman, expressly charging her estate with the payment of a note, is such a security as a national bank may take. (*Third National Bank v. Blake*, 73 N. Y., 260; 2 N. B. C., 300.)

*Bank has right to accumulate a surplus before declaring dividend.*

35 (N. Y. Sup.). A bank has a right to accumulate a surplus before declaring dividends on its stock. (*Reynolds v. Bank of Mt. Vernon*, 39 N. Y. S., 623.)

*May employ counsel.*

36 (Okla., 1895). Under Revised Statutes United States, section 5136, subdivision 4, authorizing national banks "to sue and be sued, complain, and defend in any court of law or equity, as fully as natural persons," such banks have power to employ attorneys to prosecute or defend suits, and the president may agree as to their compensation. (*National Bank of Guthrie v. Earl*, 39 P., 391; 2 Okla., 617.)

*May form clearing-house association and issue clearing-house certificates.*

37 (Pa., 1895). The national banks of a city formed a clearing-house association to facilitate the settlement of daily balances between them at a fixed place, and agreed, in order to dispense with the handling of money, that the several banks should deposit in the hands of a committee either cash or securities at a fixed ratio on their capital stock, for which the committee should issue certificates to be used in paying balances against the several banks. Subsequently the association, for the purpose of enabling the members to afford assistance to the mercantile and manufacturing community, and also to facilitate the daily interbank settlements, authorized the committee to receive from any member additional deposits of cash or securities and issue certificates therefor in such amounts and to such percentage as they deemed advisable, which certificates should be accepted in payment of daily balances on condition that the deposits therefor should be held by the committee as a special deposit, pledged for the redemption of the certificates, and the committee were made the trustees for all the members of the association and authorized to collect such deposits. *Held*, that there was no violation of the laws relating to national banks. (*Philler v. Patterson*, 32 A., 26; 168 Pa. St., 468.)

*Compromise with creditors.*

38 (Wis., 1896). In an action for an alleged balance it appeared that defendants McG. and W. illegally undertook to corner the lard market; that McG. was a partner in the firm through whom the transactions were carried on, but that W. was not; that the deal ruined the firm, and that the receiver for it undertook to effect a settlement; that defendants were personally liable for a part of the indebtedness by their

## POWERS—Continued.

## IN GENERAL—continued.

indorsements on the firm's notes, and that at the receiver's solicitation they agreed to contribute a certain sum each on consideration of a release from all creditors; that the receiver thereupon submitted the firm's proposition to pay 50 per cent of the indebtedness, in full settlement of all unsecured claims, stating that the affairs of the firm were in great confusion and that unless the compromise were effected the matter would "only terminate after long, vexatious, and fruitless litigation;" that all of the creditors accepted the payment and signed a release in full. *Held*, that the transaction was a valid compromise. (Winslow and Pinney, J.J., dissenting.) (Continental National Bank of Chicago v. McGeoch, 66 N. W., 606; 92 Wis., 286.)

*When bank may act for others in endeavoring to recover stolen property.*

- 39 (U. S. Sup. Ct., 1886). Where a national bank was broken into by burglars, and property belonging to it and to others was taken therefrom, the bank may take measures to recover its own; and it may lawfully undertake to act also for others thus jointly concerned with itself; and want of proper diligence, skill, and care in the performance of such an undertaking would render it liable to respond in damage for failure. (Wylie v. Northampton National Bank, 119 U. S., 361; 3 N. B. C., 188.)

## POWER TO DEAL IN BONDS.

*Power to purchase bonds.*

- 1 (U. S. Sup. Ct., 1891). A national bank having without authority purchased bonds, may retain them until the consideration is repaid. (Logan Co. National Bank v. Townsend, 139 U. S., 67.)
- 2 (Ky. Appls., 1902). Section 5736, United States Revised Statutes, confers express power on a national bank to discount and negotiate promissory notes, bills of exchange, and other evidences of debt. *Held*, that bonds are evidences of debt and national banks are therefore authorized to purchase corporate and municipal bonds. (Newport National Bank v. Board of Education, 70 S. W., 186; 5 B. C., 63.)
3. A national banking association is not authorized to act as a broker or agent in the purchase of bonds and stocks.  
(Md.) Weckler v. The First National Bank of Hagerstown, 42 Md., 581;  
(Pa.) First National Bank of Allentown v. Hoch, 89 Pa. St., 324.
- 4 (Miss. Sup., 1897). A municipality having sold its bonds to a national bank is estopped to plead that the purchase was ultra vires. (Town Council of Lexington v. Union Nat. Bank, 22 S. R., 291; 75 Miss., 1.)

*May discount coupons of municipal bonds.*

5. A national banking association may take and hold the coupons of municipal bonds, and may maintain actions thereon.  
(U. S. C. C., 1879) First National Bank of North Bennington v. Town of Bennington, 2 N. B. C., 437;  
(U. S. C. C.) Lyons v. Lyons National Bank, 19 Blatch., 279.

*National bank may not sell mortgage bonds on commission.*

- 6 (U. S. C. C. A., 1896). It is not within the power of a national bank to engage in the business of selling mortgage bonds on commission. (Farmers and Merchants' National Bank v. Smith, 77 Fed. Rep., 129.)

*May deal in Government securities.*

7. National banking associations can engage in the business of dealing in and exchanging Government securities.  
(Iowa) Leach v. Hale, 31 Iowa, 69;  
(N. Y.) Van Leuven v. First National Bank, 54 N. Y., 671;  
(N. Y.) Yerkes v. National Bank of Port Jervis, 69 N. Y., 383.

## POWERS—Continued.

## POWER TO PURCHASE ITS OWN STOCK OR LOAN MONEY ON SECURITY THEREOF.

*May not buy its own stock.*

- 1 (U. S. Dist. Ct., 1878). A national bank purchased some of its own stock and divided it among some of its directors. One of the directors took some of the stock, giving his note for it, the bank retaining the certificate, but the stock being transferred to him on the bank books, and he receiving dividends on it. This director becoming bankrupt, he transferred the stock to the bank teller, the bank retaining his note. In an action by the assignee to set aside the transfer as a preference, *held*, that the bank had no power to purchase or convey the stock, and no title to it passed. (*Meyers v. Valley National Bank*, 2 N. B. C., 156.)

*May not buy its own stock, exception.*

- 2 (U. S.). The purchase of its own stock by a national bank, not for the purpose of preventing, or necessary to prevent, a loss upon a debt previously contracted, is illegal, and the bank may maintain an action at law to recover the money paid therefor without tendering back the stock.

(U. S. C. C. A., 1898) *Burrows v. Niblack*, 84 Fed. Rep., 111;

(U. S. Dist. Ct., 1878) *Meyers v. Valley Nat. Bank*, 2 N. B. C., 156.

*Bank may make lawful sale of stock unlawfully bought, or taken as security.*

- 3 (U. S. Sup. Ct., 1882). Where a national bank made a loan upon a pledge of its own shares and afterwards sold the shares to obtain payment of the loan, which exceeded the amount realized from the shares, *held*, that the owner of the shares could not, on the ground that the statute forbids a national bank to take its own shares as security, recover from the bank the amount realized upon the sale of the shares. (*First National Bank of Xenia v. Stewart*, 107 U. S., 676; 3 N. B. C., 96.)
- 4 (U. S. Sup. Ct., 1901). The fact that a national bank purchased shares of its own stock ultra vires does not render its subsequent sale of such stock to another unlawful, or the stock void in the hands of the purchaser; nor does it constitute any defense to an action by a receiver of the bank against such purchaser to recover an assessment made after the bank's insolvency. (*Lantry v. Wallace*, 182 U. S., 536.)
- 5 (U. S. C. C. A., 1898). The statutory inhibition against the purchase by a national bank of its own stock does not render stock so purchased void; and where, in such case, the stock is held for the bank by a nominal owner, a subsequent purchaser for value received by the bank acquires a good title, which can not be questioned by the bank or its creditors. (*Wallace v. Hood*, 89 Fed. Rep., 11; affirmed by U. S. Sup. Ct., 182 U. S., 555.)

*When may take its own stock as collateral.*

6. National banks can not make valid loans or discounts on the security of their own stock and can take said stock as collateral or purchase it only when necessary to prevent loss on debts previously contracted in good faith.

(U. S. Sup. Ct. 1870) *First National Bank of South Bend v. Lanier*, 78 U. S., 369;

(Va.) *Feckheimer v. National Exchange Bank*, 79 Va., 80.

*Bank's officer can not bind bank to purchase its own stock.*

- 7 (U. S. C. C., 1877). An agreement by an officer of the bank that if another would purchase stock in the bank the bank would take it off his hands at any time is void. (*Bowden v. Santos*, 1 Hughes, 158.)

*No penalty for violation of section 5201, Revised Statutes.*

8. The national banking act prescribes no penalty either on the borrower or on the bank for a loan in violation of section 5201, and the prohibi-

## POWERS—Continued.

## POWER TO PURCHASE ITS OWN STOCK OR LOAN MONEY ON SECURITY THEREOF—cont'd.

tion can be urged by some one else than the Government only before the contract is executed.

(U. S. Sup. Ct., 1882) *First National Bank of Xenia v. Stewart*, 107 U. S., 676;

(N. Y.) *Walden National Bank v. Birch*, 130 N. Y., 221.

*Parties to violation of section 5201 will not be relieved.*

9 (N. Y.). The parties to a loan of a national bank on the security of its own stock, being paid in pari delicto, will not be relieved by the court. After the shares have been sold by the consent of the borrower, and the proceeds set off against his loan, the courts will not interpose. (*Chapins v. Merchants' Nat. Bank*, 14 N. Y. St., 272.)

*Lien of bank on shares for debt due it.*

10 (U. S. Sup. Ct., 1903). The mere statement by a borrower from a national bank, made to the president when the loan is obtained, that his stock in the bank is security for the loan, there being no delivery of the certificates, does not amount to a pledge of the stock, nor does it give the bank any lien thereon as against one subsequently loaning on the stock in good faith and receiving the certificates as collateral. (*Third Nat. Bank of Buffalo v. Buffalo German Ins. Co.*, 193 U. S., 581.)

11 (U. S. Sup. Ct., 1903). The provisions of section 36 of the national banking act of 1863, empowering the withholding of transfer of the stock of a shareholder indebted to the bank, were not only omitted from the national banking act of 1864, but were expressly repealed thereby. (Ib.)

12 (U. S. Sup. Ct., 1903). A provision in the charter and by-laws, and a condition in a certificate of stock, of a national bank, forbidding the transfer of stock where the stockholder is indebted to the bank, is void as repugnant to the national banking act and in conflict with the public policy embodied in that act, and creates no lien which the bank can enforce by refusing to transfer the stock to a holder for value in good faith. (Ib.)

13 (U. S. Sup. Ct., 1903). A condition in a certificate of stock of a national bank which is void under the national banking act will not operate as a notice to one loaning on the stock as collateral, that it is subject to a lien of the bank which will affect the right of the pledgee of having the stock transferred to him. (Ib.)

*Lien of bank on shares and dividends.*

14 (Me. Sup., 1874). A national bank has a lien on and the right to hold a cash dividend as pledge for the indebtedness of the shareholder to the bank. (*Hagar v. Union Nat. Bank*, 1 N. B. C., 523; 63 Me., 509.)

15 (Me. Sup., 1874). A national bank may attach the shares of a stockholder therein for his debt due the bank. (Ib.)

16 (Me. Sup., 1874). A national bank sued a shareholder therein for money due and attached his shares. Pending suit he demanded payment of the dividends declared upon the attached shares, which was refused. He afterwards settled the suit and brought an action for his dividends, without renewing his demands. *Held*, that the demand while the shares were attached was a nullity, and as dividends were not payable until demanded, the action could not be maintained. (Ib.)

## PURCHASE OF STOCK IN OTHER BANKS.

1 (U. S. Sup. Ct., 1899). It is ultra vires on the part of a national bank to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national bank. (*First National Bank of Concord, N. H., v. Hawkins*, 1 Banking Cases, 635; 174 U. S., 364.)

2 (U. S. Sup. Ct., 1899). A national bank which has purchased, as an investment, and holds as such, shares of stock in another national



## POWERS—Continued.

## PURCHASE OF STOCK IN OTHER BANKS—continued.

bank is not estopped in an action by the receiver of the latter to enforce the stockholder's liability arising under an assessment by the Comptroller of the Currency to protect itself by alleging the unlawfulness of its own action in so purchasing and holding the stock. (Ib.)

- 3 (U. S. C. C., 1897). An agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction, such securities having been received by such maker as trustee for the bank. (*Tillinghast v. Carr*, 82 Fed. Rep., 298.)

## PURCHASE OF STOCKS IN GENERAL.

*National banks may not deal in stocks.*

- 1 (U. S. Sup. Ct., 1875). A national banking association can not deal in stocks. The prohibition is to be implied from the failure to grant the power. (*First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S., 122.)
- 2 (U. S. Sup. Ct., 1897). The banking act does not empower national banks to deal in stock. Purchase of stock by a national bank is ultra vires and void and no rights or liabilities can be based upon it. (*California National Bank v. Kennedy*, 167 U. S., 362.)
- 3 (Cal., 1898). A national bank has no authority to deal in the stock of other corporations and may set up such ultra vires act in defense to any liability because thereof. (*Chemical National Bank of New York v. Havermale*, 52 Pac. Rep., 1071; 120 Cal., 601.)
- 4 (Pa.). A national bank can not lawfully sell stock on commission for others. (*Smith v. Philadelphia National Bank*, 1 Walk., Pa., 318; *Searle v. First National Bank*, 2 Walk., Pa., 395; *Pepperday v. Citizens' National Bank of Latrobe*, 183 Pa. St., 519.)

*May not acquire stock as an investment.*

5. The purchase by a corporation, only empowered by its charter to transact a banking business, of the stock of another corporation, as an investment, and not as security or in payment of a debt, is ultra vires and void, and can not be validated by estoppel. Hence such a corporation can not be held liable for an assessment as a stockholder of a national bank, where it purchased the stock as an investment, although it retained such stock until the national bank became insolvent, and received dividends thereon.  
(U. S. C. C. A., 1899) *Schofield v. Goodrich Bros. Banking Co.*, 98 Fed. Rep., 271; 2 B. C., 253;  
(U. S. Sup. Ct., 1897) *California Nat. Bank v. Kennedy*, 167 U. S., 362.

*May acquire stock in compromise of claim or to secure existing debt.*

- 6 (U. S. Sup. Ct., 1875). A national banking association, in the compromise of a claim growing out of its legitimate business, may take railroad stock. (*First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S., 122.)
- 7 (U. S. Sup. Ct., 1875). And when necessary to do so, it may pay the difference between the value of the stock and the amount of the claim. (Ib.)
- 8 (U. S. Sup. Ct., 1875). In adjusting and compromising claims growing out of a legitimate banking transaction it may take stocks of other corporations with a view to selling them at a profit. (*First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 92 U. S., 122.)

## POWERS—Continued.

## PURCHASE OF STOCK IN GENERAL—continued.

- 9 (Md.). A national bank may receive stock in a corporation in order to secure an existing indebtedness, but not for speculation. (*First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 39 Md., 600.)

*National bank may take stock in corporation as collateral.*

- 10 (U. S. C. C., 1869). A national bank may lend money upon the personal obligation of the borrower, secured by a pledge of stock of a corporation as collateral security. (*Shoemaker v. The Nat. Mechanics' Bank*, 1 N. B. C., 169; 2 Abbott, U. S., 416.)
- 11 (U. S. C. C., 1877). A national bank may loan money and take stock in a corporation as collateral security therefor. (*Canfield v. State Nat. Bank of Minneapolis*, 1 N. B. C., 312.)
- 12 (Minn. Sup., 1880). The transfer to a national bank, as security for a loan, of stock of a corporation whose property is solely real estate, is not invalid within the national banking act as a loan upon a mortgage security. (*Baldwin v. State National Bank of Minneapolis*, 1 N. W. Rep., 261; 2 N. B. C., 278; 26 Minn., 43.)

*May take warehouse receipt as collateral.*

- 13 (Ohio Sup.). A national bank may take a warehouse receipt as collateral security for a loan. (*Cleveland, Brown & Co. v. Shoeman*, 40 Ohio St., 176.)

*May not act as broker in sale of stocks.*

14. The selling of stock by a national bank for another person is outside the banking business and its chartered powers.  
(U. S. C. C. A., 1896) *Farmers and Merchants' National Bank v. Smith*, 77 Fed. Rep., 129;  
(Cal., 1898) *Chemical National Bank v. Havermale*, 52 Pac. Rep., 1071; 120 Cal., 601;  
(Md. App., 1875) *Weckler v. First National Bank of Hagerstown*, 1 N. B. C., 533; 42 Md., 581;  
(Pa.) *Smith v. Philadelphia National Bank*, 1 Walk., Pa., 318;  
(Pa.) *Searle v. First National Bank*, 2 Walk., Pa., 295;  
(Pa.) *Pepperday v. Citizens' National Bank of Latrobe*, 183 Pa. St., 519;  
(Pa.) *First National Bank of Allentown v. Hoch*, 2 N. B. C., 375; 89 Pa. St., 324.

## PURCHASE OF NEGOTIABLE PAPER.

*What is discount and purchase.*

- 1 (U. S. C. C. A., 1891). The word "discount" as used in the banking business includes "purchase." (*Danforth v. Nat. State Bank of Elizabeth*, 48 Fed. Rep., 271.)
- 2 (Mass.). When the indorser or his agent brings the note to a national bank and receives the proceeds therefor, the transaction is a discounting of such note. (*Prescott Nat. Bank v. Butler*, 157 Mass., 548; 32 N. E. R., 909.)
- 3 (Mo.). When a national bank receives notes and they are placed to the credit of a depositor, it constitutes a discount and purchase, though no interest was charged in advance or no money passed over the counter. (*Ellerbee v. Nat. Bank*, 109 Mo., 445; 19 S. W. R., 241.)

*May purchase negotiable paper.*

- 4 (Ill. App., 1884). A national bank may purchase negotiable paper. (*First National Bank of Greenville v. Sherburne*, 14 Bradw., 566; 3 N. B. C., 382.)
- 5 (Kans. Sup., 1878). A bank empowered to discount negotiable notes has power to purchase such notes. (*Pape v. Capitol Bank of Topeka*, 20 Kans., 440; 27 Am. Rep., 183; 2 N. B. C., 238.)

## POWERS—Continued.

## PURCHASE OF NEGOTIABLE PAPER—continued.

*May acquire negotiable paper to secure debt.*

- 6 (Pa.). National banks have the power to receive promissory notes to secure a previous debt, and when they so acquire them they are bona fide holders. (*Philler v. Essler*, 1 Pa. Dist. Rep., 282.)

*May not purchase negotiable paper.*

7. A national banking association can not purchase negotiable paper. (But see *Smith v. The Exchange Bank of Pittsburg*, 26 Ohio St., 141.) (Md.) *Lazear v. National Union Bank of Baltimore*, 52 Md., 78; (Minn.) *First National Bank of Rochester v. Pierson*, 24 Minn., 140; (Minn.) *Farmers and Mechanics' Bank v. Baldwin*, 23 Minn., 198.

*Only United States can object to purchase of note.*

- 8 (Mass.). In an action by a national bank upon a promissory note it can not be pleaded by an indorser as a defense that the bank acquired the note by purchase; for even if such purchase is in excess of the power of the bank, this can be availed of only in proceedings by the Government to forfeit the franchises of the bank. (*Prescott National Bank of Lowell v. Benjamin F. Butler*, 32 N. E., 909; 157 Mass., 548.)
- 9 (Mass.). Even if a national bank does not get the legal title to the promissory note bought in the market, it may maintain a suit as the holder thereof. (Ib.)

*Only United States may question ultra vires act.*

- 10 (U. S. Sup. Ct., 1892). When no penalty is prescribed by the national banking act for acts prohibited to the bank and its officers, the validity of such acts can not be questioned by private parties, but by the United States alone. (*Thompson v. St. Nicholas Nat. Bank*, 146 U. S., 240.)
- 11 (Mass.). A national bank can not avoid an ultra vires purchase of negotiable paper, both parties to the purchase being in pari delicto. (*Attleboro Nat. Bank v. Rogers*, 125 Mass., 339.)
- 12 (Minn.). The plea of an ultra vires purchase of negotiable paper can not be made to defeat a recovery by a national bank on the same. (*Merchants' Nat. Bank of St. Paul v. Hanson*, 33 Minn., 40; overruling *First Nat. Bank of Rochester v. Pierson*, 24 Minn., 140.)
- 13 (S. Dak., 1895). Want of authority in plaintiff national bank to purchase a negotiable note can not be pleaded by the maker of the note in defense. (*First National Bank of Pierre v. Smith*, 65 N. W., 437; 8 S. Dak., 7.)

*Contra—When national bank can not sue on purchased note.*

- 14 (Minn.). As a national banking association can acquire no title to a note purchased by it "for speculative purposes," it can maintain no action thereon in a State where the person suing must be owner of the paper. (*First National Bank of Rochester v. Pierson*, 24 Minn., 140.)

## POWER TO ISSUE CERTIFICATE OF DEPOSIT. (NOT POST NOTES.)

- 1 (U. S. C. C., 1886). Certificates of deposit in the ordinary form, issued by a national bank to depositors and payable to order, are not post notes within the prohibition of section 5183, Revised Statutes. (*Riddle v. First National Bank of Butler*, 27 Fed. Rep., 503.)
- 2 (Mass.). A certificate of deposit, indorsed by payee, is not in violation of section 5183, Revised Statutes, which forbids national banks to issue any other notes to circulate as money than such as are authorized by the provisions of the statute. (*In re Hunt*, 141 Mass., 515.)

## POWERS—Continued.

## POWER TO HOLD OR ACQUIRE REAL ESTATE.

*May purchase realty to secure previous debt.*

- 1 (Ill. Sup., 1879). To secure a preexisting debt in good faith, a national bank may acquire title to real estate by direct conveyance or judicial sale, although such real estate may be encumbered. (*Mapes v. Scott*, 88 Ill., 352; 2 N. B. C., 228.)
- 2 (Ind. Sup., 1881). A national bank may take title to real estate in discharge of previous indebtedness. (*Turner v. First National Bank of Madison*, 78 Ind., 19; 3 N. B. C., 408.)

*When may purchase more than amount of debt.*

- 3 (Ill.). Where the purpose is to secure a debt previously contracted, a national banking association may take a conveyance of real estate worth more than the debt, and pay the difference between the debt and the value of the property. (*Libby v. Union National Bank*, 99 Ill., 622.)
- 4 (Mass.). The amount of real estate which a national banking association may purchase to secure a preexisting debt is not limited to the exact amount of the debt, but as much may be purchased as is necessary to secure the debt due, so long as the security of such debt is the real object of the purchase. (*Upton v. National Bank of South Reading*, 120 Mass., 153.)

*May purchase at sheriff's sale and sell.*

- 5 (Ind. Sup., 1880). A national bank may purchase, at sheriff's sale, land mortgaged to it as security for a previous debt. (*Heath v. Second National Bank of Lafayette*, 70 Ind., 106; 3 N. B. C., 406.)
- 6 (Mo. Sup., 1882). National banks may hold and convey real estate which they purchase at sales under judgments, decrees, or mortgages held by them to secure debts due them. (*Wherry v. Hale*, 77 Mo., 20; 3 N. B. C., 521.)

*Bank may buy undivided interest in realty.*

- 7 (U. S. C. C. A., 1898). Where a national bank has lawfully acquired an interest in real property in satisfaction of a debt, it may purchase other undivided interests therein or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage. (*Cockrill v. Abeles et al.*, 86 Fed. Rep., 505.)
- 8 (U. S. C. C. A., 1898). Where a national bank acquired certain mill property in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mills as the bank's agent, using its funds, and operated them for the bank at a loss of \$23,000, the directors of the bank participating are liable to the creditors for the loss. (*Ib.*)

*May purchase land at foreclosure sale and cut and sell timber.*

- 9 (U. S. Dist. Ct., 1887). A national bank that has loaned money on timber land may, to protect itself and collect the debt, purchase the land at foreclosure sale and cut and sell the timber. (*Roebeling Sons' Co. v. First National Bank et al.*, 30 Fed. Rep., 744.)

*Ultra vires purchase voidable only.*

10. Where a national banking association acquires real estate which it is not authorized to take, the conveyance to it is not void, but only voidable, and the title of the association to such real estate is good until assailed in a direct proceeding by the Government.
  - (U. S. Sup. Ct., 1878) *Union National Bank v. Matthews*, 98 U. S., 621;
  - (U. S. Sup. Ct., 1880) *National Bank of Genesee v. Whitney*, 103 U. S., 99;
  - (U. S. Sup. Ct., 1881) *Swope v. Leffingwell*, 105 U. S., 3;
  - (U. S. Sup. Ct., 1884) *Reynolds v. First National Bank of Crawfordsville*, 112 U. S., 405;

## POWERS—Continued.

## POWER TO HOLD OR ACQUIRE REAL ESTATE—continued.

(U. S. Sup. Ct., 1884) *Fortier v. New Orleans National Bank*, 112 U. S., 439.

*When purchase part void and part voidable.*

- 11 (U. S. Sup. Ct., 1884). The fact that bank, at judgment sale of land mortgaged to it, purchases the mortgaged property and also other property which it was not authorized to acquire, does not invalidate its title as to the mortgaged property. (*Reynolds v. First National Bank of Crawfordsville*, 112 U. S., 405.)

*Leasing and improvement of real estate.*

- 12 (U. S. Sup. Ct., 1904). A national bank erected a building on leased property, the lease securing the landlord by a lien on the building and the personal obligation of bank. While a large amount of rent and taxes were unpaid the bank became insolvent, the property was not paying fixed charges; after notice to, and no objections by, the stockholders, and no creditors intervening, the bank conveyed the property with the building back to the landlord in consideration of his releasing the bank and the stockholders from all liabilities accrued and to accrue under the lease. *Held*, that the proceeding was not *ultra vires*, and that as the judgment of the stockholders and officers had been prudently exercised in good faith the landlord acquired title to the land and building and was not liable to account for the value of the building in an action brought by a creditor who had knowledge of, and had not protested against, the conveyance when made. It is exceedingly disputable whether it is an abuse of discretion justifying reversal by this court for the circuit court to deny a motion to file an amended bill after judgment entered. (*Brown v. Schleier*, 194 U. S., 18.)
- 13 (U. S. C. C. A., 1902). The power conferred on national banks by Revised Statutes, section 5137 (U. S. Comp. St., 1901, p. 3460), to purchase and hold such real estate "as shall be necessary for its immediate accommodation in the transaction of its business" includes the power to lease real estate for such purpose, and a bank does not exceed its powers by leasing ground for a term of years under an agreement with the owner that it will erect a building thereon for its use, provided it acts in good faith, and for the purpose of obtaining an eligible location and a suitable building in which to conduct its business. Nor is it limited to the construction of a building only sufficient for its own use, but where it has acquired property by purchase or lease for the purpose authorized by the statute it may improve the same in any manner that other prudent owners would do, so as to render it most productive. (*Brown v. Schleier et al.*, 118 Fed. Rep., 981.)
- 14 (U. S. C. C. A., 1902). A lease of property by a national bank for ninety-nine years is not *ultra vires* and void because the term will outlast its corporate life. Being authorized by the statute to purchase real estate in fee simple for specified purposes, it may acquire any lesser estate or interest which is vendible. (*Ib.*)

*Indebtedness—Obligation to pay rent.*

- 15 (U. S. C. C. A., 1902). Nor is such a lease invalid because the aggregate rental which the bank agrees to pay during the term in monthly installments exceeds its capital stock. Such an agreement does not create an indebtedness for the aggregate amount of the installments within the meaning of Revised Statutes, section 5202 (U. S. Comp. St., 1901, p. 3494). (*Ib.*)

*Acts ultra vires—Liability of third parties.*

- 16 (U. S. C. C. A., 1902). A lessor of real estate to a national bank for a long term, in which the bank covenants to erect a bank building which shall become part of the realty, can not be held accountable to the stockholders or creditors of the bank because it may have exceeded its powers by expending more money in the erection of the

## POWERS—Continued.

## POWER TO HOLD OR ACQUIRE REAL ESTATE—continued.

building than it was authorized to do under the law and more than was required by the terms of the lease, nor can such excessive expenditure be charged as a lien upon the property in favor of creditors after the same has passed into the hands of the lessor. (Ib.)

*Deed to third party in trust for bank.*

- 17 (Mo. Sup., 1882). To avoid the supposed effect of certain provisions of the national banking act a national bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee for a receiver of the bank was valid. (*Wherry v. Hale*, 77 Mo., 20; 3 N. B. C., 521.)

## WHEN NATIONAL BANK MAY TAKE MORTGAGE.

*May take mortgage to secure previous debt.*

- 1 (U. S. C. C., 1878). A national bank can not loan money on real-estate security, but after a creditor has made default, or after a loan has been actually made, the bank may take real-estate security therefor, unless the transaction be colorable for the purpose of evading the statute. (*Merchants' National Bank v. Mears*, 10 Chicago Leg. News, 180; 1 N. B. C., 353.)
- 2 (Ill. Appls., 1879). A mortgage of real estate executed to a national bank as security for a matured antecedent loan is not void. (*Warren v. De Witt County National Bank*, 3 Bradwell, 305; 2 N. B. C., 222.)
- 3 (Iowa Sup., 1873). A national bank has a right to take a chattel mortgage for the purpose of securing a previously contracted debt, and to enforce the same. (*Spafford v. The First National Bank of Tama City*, 37 Iowa, 181; 1 N. B. C., 486.)
- 4 (Ohio Sup., 1872). National banks are authorized to take mortgages on real estate in good faith to secure debts previously contracted. A national bank extended the time of payment of indebtedness at a usurious rate of interest, and took therefor notes and a mortgage made by the debtor to a third person, the notes being indorsed by the latter. *Held*, that the usury only avoided the interest, and that to the extent the debt was valid the mortgage was a bona fide security and that the bank, by becoming the owner of the notes, acquired the equity in the mortgage. (*Allen v. The First Nat. Bank of Xenia*, 1 N. B. C., 828; 23 Ohio State, 97.)
- 5 (Vt. Sup., 1879). A national bank may take a mortgage of real estate to secure an antecedent indebtedness at the time of renewing and under an agreement for future renewals of the notes evidencing the debt. (*Howard National Bank of Burlington v. Loomis*, 51 Vt., 349; 2 N. B. C., 424.)

*Deed of trust to bank may be enforced.*

- 6 (U. S. Sup. Ct., 1878). A national bank loaned money and took as security therefor an assignment of a note and deed of trust of real estate. *Held*, that the deed of trust was not void and that the bank would not be enjoined from selling thereunder. (*Union Nat. Bank et al. v. Matthews*, 98 U. S., 621; 2 N. B. C., 12.)
- 7 (U. S. Sup. Ct., 1878). While a national bank is prohibited by law from loaning money on real-estate security, yet if it does make a loan on such security the security is not void but may be enforced. This is the only point decided by the court. (Ib.)

*Agreement that bank may enforce indorser's indemnity valid.*

8. An agreement by a national banking association to the effect that, in case a note discounted by it shall not be paid, a mortgage given by the maker to his indorser shall inure to the benefit of the association is not inhibited by the national banking law.

(*Iowa*) *First National Bank v. Haire*, 36 Iowa, 443.

## POWERS—Continued.

## WHEN NATIONAL BANK MAY TAKE MORTGAGE—continued.

*When may acquire and enforce prior liens.*

9. A national banking association, having taken a mortgage on real estate to secure a debt previously contracted, may, in order to protect itself, pay off a prior lien on the said real estate; and the lien which it thus acquires it may enforce.

(Ind.) *Holmes v. Boyd*, 90 Ind., 332;

(Kans.) *Ornn v. Merchants' National Bank*, 16 Kans., 341.

*Borrower may mortgage to another for bank.*

- 10 (Iowa Sup., 1873). The national banking act does not prohibit a borrower from mortgaging real estate to another to be held by such mortgagee as security to a national bank for money advanced to the first party. (*First Nat. Bank v. Haire*, 1 N. B. C., 480; 36 Iowa, 443.)

*May take mortgage for purchase price of realty sold.*

- 11 (La.). Where a national banking association sells real estate, it may take a mortgage thereon to secure the payment of the purchase money. (*New Orleans National Bank v. Raymond*, 29 La. Ann., 355.)

*May take, as collateral, stock representing only realty.*

- 12 (Minn.). A national banking association may take as security for a loan the stock of a corporation whose entire capital is invested in real estate. Such a loan does not amount to a lending upon a mortgage. (*Baldwin v. Canfield*, 27 Minn., 43.) ♦

*May buy and enforce secured note subject only to forfeiture.*

- 13 (Mo. Sup., 1879). If a national bank discounts a note secured by a deed of trust on real estate, the security passes to and may be enforced by the bank, subject only to forfeiture of its charter, which penalty can be invoked only by the United States. (*Thornton v. National Exchange Bank*, 71 Mo., 221; 3 N. B. C., 513.)

*May buy additional note to protect its claim.*

- 14 (N. C. Sup., 1881). A national bank may buy a note of its debtor, in order to gain the whole benefit from the mortgage collateral to such note, and having done this may take a new mortgage for the whole sum. (*Oldham v. Bank*, 3 N. B. C., 688; 85 N. C., 240.)

*Foreclosure of mortgage given to predecessor State bank.*

- 15 (Nebr. Sup., 1879). A national bank organized as successor to a State bank may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note and assigned to it by the State bank on the formation of the national bank. (*Scofield v. State National Bank of Lincoln*, 9 Nebr., 316; 31 Am. Rep., 412; 2 N. B. C., 280.)

*Mortgages for present or future advances invalid.*

16. National banking associations are, by implication, prohibited from taking mortgages on real estate as security for contemporaneous loans.

(U. S. Sup. Ct., 1878) *Union National Bank v. Matthews*, 98 U. S., 621;

(Ill.) *Friedley v. Bowen*, 87 Ill., 151;

(Mo.) *Commonwealth Bank v. Clark*, 4 Mo., 59.

17. A national bank may take a mortgage in order to secure a debt previously contracted, but not to secure contemporaneous or future advances.

(U. S. C. C., 1873) *Kansas Valley National Bank v. Rowell*, 2 Dillon, 371; 1 N. B. C., 264;

(U. S. C. C., 1878) *Merchants' National Bank v. Mears*, 1 N. B. C., 353;

(U. S.) *Mathews v. Abbott*, 2 Hask., 289;

(Iowa Sup., 1873) *First National Bank v. Haire*, 1 N. B. C., 480; 36 Iowa, 443;

## POWERS—Continued.

## WHEN NATIONAL BANK MAY TAKE MORTGAGE—continued.

- (Kans. Sup., 1876) *Ornn v. Merchants' National Bank*, 1 N. B. C., 490; 16 Kans., 341;  
 (Mo. Sup., 1876) *Matthews v. Skinner*, 1 N. B. C., 647; 62 Mo., 329;  
 (N. Y., 1877) *Crocker v. Whitney*, 1 N. B. C., 745; 71 N. Y., 161;  
 (Ohio, 1872) *Allen v. First National Bank*, 1 N. B. C., 828; 23 Ohio State, 97;  
 (Pa., 1873) *Fowler v. Scully*, 1 N. B. C., 854; 72 Pa. St., 456;  
 (Pa., 1876) *Wood v. People's National Bank of Pittsburg*, 1 N. B. C., 888; 83 Pa. St., 57.

## VALIDITY OF MORTGAGES WHEN TAKEN ULTRA VIRES.

*Mortgage for present loan voidable by United States only—Only United States can object to loans on mortgage security.*

1. No one but the Government can object that a national bank has exceeded its authority in accepting real estate security for present or future advances.  
 (U. S. Sup. Ct., 1880) *National Bank of Genesee v. Whitney*, 103 U. S., 99; 3 N. B. C., 5;  
 (U. S. Sup. Ct., 1881) *Swope v. Leffingwell*, 105 U. S., 3;  
 (U. S. Sup. Ct., 1884) *Reynolds v. First National Bank of Crawfordsville*, 112 U. S., 405;  
 (U. S. Sup. Ct., 1884) *Fortier v. New Orleans National Bank*, 112 U. S., 439; 3 N. B. C., 140;  
 (U. S. Sup. Ct., 1878) *Union National Bank v. Matthews*, 98 U. S., 621; 2 N. B. C., 12.
2. The United States only can question the power of a national bank to loan money on a trust deed as security.  
 (Cal. Sup., 1898) *Camp v. Land*, 54 Pac. Rep., 839;  
 (Mich., 1898) *Fifth National Bank of Grand Rapids v. Pierce*, 75 N. W. Rep., 1058; 117 Mich., 376;  
 (Mo. Sup., 1882) *Wherry v. Hale*, 77 Mo., 20; 3 N. B. C., 521.
- 3 (Ill. Sup., 1877). A real mortgage executed to a bank officer at the time of, and to secure a loan by the bank, is void. (*Friedley v. Bowen*, 2 N. B. C., 224; 87 Ill., 151.)
- 4 (Iowa Sup., 1879). A real mortgage to a national bank to secure a present debt or future advances is not void. (*First National Bank of Waterloo v. Elmore*, 3 N. W., 547; 2 N. B. C., 237; 52 Iowa, 541.)
- 5 (Kans. Sup., 1898). After a contract is executed the defense of ultra vires by a debtor can not be made against a national bank. (*Farmers and Merchants' Nat Bank v. Robinson*, 53 Pac. Rep., 762.)
- 6 (La.). The objection that a national bank has loaned money on real estate in violation of the prohibition of the national banking laws does not lie in the mouth of the delinquent debtor of such loan, and does not disable the bank from enforcing the same by foreclosing the mortgage. The United States alone can complain of such violation. (*State National Bank v. Flathers*, 45 La. Ann., 75; 12 So., 243.)
- 7 (La.). A national bank is not forbidden from collecting by judicial means a debt secured by a mortgage taken contrary to the provisions of the national banking law, and only takes such mortgage subject to the risk of dissolution. (*State Nat. Bank v. Flathers*, 45 La. Ann., 75.)
- 8 (Mo. Sup., 1882). If a national bank violates the national banking act in dealing with real estate, the Government alone can take advantage of it. (*Wherry v. Hale*, 77 Mo., 20; 3 N. B. C., 521.)
- 9 (Mo. Sup., 1898). Only the United States can object to an ultra vires conveyance of realty to a national bank. (*Hall v. Farmers and Merchants' Bank*, 46 S. W. Rep., 1000; 145 Mo., 418.)



## POWERS—Continued.

## VALIDITY OF MORTGAGES WHEN TAKEN ULTRA VIRES—continued.

- 10 (Mo., 1876). A national bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined. (Matthews v. Skinker, 62 Mo., 329; 1 N. B. C., 647.)
- 11 (N. J. Appls., 1880). A mortgage to a national bank, to secure a present loan by the discount of commercial paper in the usual course of business, is not void but only voidable at the election of the Government. (Graham v. Nat. Bank of New York, 2 N. B. C., 293; 32 N. J. Eq., 804.)
- 12 (Pa., 1876). A mortgage to a national bank is valid as to preexisting debts, but void as to future loans. (Wood v. People's Nat. Bank of Pittsburg, 83 Pa. St., 57; 1 N. B. C., 888.)
- 13 (Pa., 1873). F. gave to a national bank a mortgage to secure notes thereafter to be discounted for him. *Held*, that under the national currency act of June 3, 1864, the mortgage was void and could not be enforced against the assignee of F. (Fowler v. Scully, 1 N. B. C., 854; 72 Pa. St., 456.)
- 14 (Va. Appls., 1879). The provision in the national banking law against loans on real estate security was intended for the benefit of the Government alone. (Wrotens, Assignee, v. Armat, 2 N. B. C., 426; 31 Grattan, 228.)
- 15 (Wash.). A national bank has power to take an assignment of a mortgage on land to secure a loan made at the time of the assignment. (First National Bank of Aberdeen v. Andrews et al.; Young v. Same, 34 P., 913; 7 Wash., 261.)

*Mortgages in violation of statute enforceable.*

- 16 (Nebr. Sup., 1901). A party who has secured a loan from a national bank, and given real estate security therefor, can not be heard to deny the right of the bank to enforce the provisions of the mortgage because of the section of the United States statutes prohibiting the taking of real estate security for a loan negotiated by a national bank. (First Nat. Bank of Sutton v. Grosshans, 85 N. W. Rep., 542; 3 Banking Cases, 283; 61 Nebr., 575.)
- 17 (Nebr. Sup., 1901). Where security on real estate has been taken by a national bank on a contemporaneous loan, the same may be enforced notwithstanding the provisions of the United States statute prohibiting that character of security. (Ib.)

*Taking of real estate security by a bank president for debt due it same in legal effect as if taken by bank.*

- 18 (U. S. Sup. Ct., 1903). Where the State law does not forbid an agent from taking security for the benefit of a principal the taking of real estate security by the president of a national bank for a debt due to the bank is in legal effect the taking of such security by the bank itself. (Schuyler Nat. Bank v. Gadsden, 191 U. S., 451.)
- 19 (U. S. Sup. Ct., 1903). The provisions of the United States statutes forbidding the taking of real estate security for a debt coincidentally contracted does not make such security void, but simply subjects the bank to be called to account for exceeding its powers. (Ib.)

*Bona fide holder of mortgage note purchased by bank.*

- 20 (Nebr. Sup., 1876). Notes secured by mortgages were assigned to a national bank and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a bona fide purchaser. (Richards v. Kountze, 4 Nebr., 200; 1 N. B. C., 652.)
- 21 (Nebr. Sup., 1876). In the absence of evidence showing the purpose and object of the assignment to the bank it can not be presumed that it was for a debt created in present in violation of the national banking act. (Ib.)

## POWERS—Continued.

## POWER TO MAKE CONTRACT OF GUARANTY.

*May guarantee payment of note.*

- 1 (U. S. Sup. Ct., 1879). A national bank on transferring a promissory note may guarantee it. (*People's Bank of Belleville v. Manufacturers' National Bank of Chicago*, 101 U. S., 181.)
- 2 (Nebr. Sup., 1894). A national bank may guarantee the payment of commercial paper as incidental to the exercise of its power to buy and sell the same. (*Thomas v. City National Bank of Hastings*, 58 N. W., 943; 40 Nebr., 501.)

*When bank's indemnity contract valid.*

- 3 (U. S. C. C., 1897). A contract by a national bank to indemnify one for loss incurred as surety on an attachment bond is not void on the ground of public policy, the loss having occurred, though the bond is not given for the benefit of the bank. (*Seeber v. Commercial National Bank of Ogden*, 77 Fed. Rep., 957.)

*Authority of officers to execute guaranty for bank.*

- 4 (U. S. Sup. Ct., 1879). The vice-president of a national bank, upon making a transfer for value of certain notes belonging to the bank (the bank being the correspondent of the transferee) transmitted the notes in a letter on the bank's letterheads and signed by himself as vice-president, in which he stated: "In accordance with your telegram I herewith hand you ten notes of \$5,000 each." "We debit your account \$50,000." "This bank hereby guarantees the payment of the principal sum and interest of said notes." This was done in behalf of the bank, and the notes were also indorsed by the same individual as vice-president of the bank. It was done with the knowledge and consent of the president and cashier of the bank, but without authority of the directors, as a board, or the majority of its members individually. *Held*, that the bank was liable on the guaranty. (*People's Bank of Belleville v. Manufacturers' National Bank of Chicago*, 101 U. S., 181; 2 N. B. C., 97.)
- 5 (U. S. Sup. Ct., 1879). It is to be presumed that the vice-president had the power to make such guaranty in the name of the bank, and the bank is estopped to deny it. (*Ib.*)
- 6 (U. S. Sup. Ct., 1879). The retention and enjoyment of the proceeds of the transaction by the bank constituted an acquiescence in such act, as effectual as would have been the most formal authorization in advance or afterwards. (*Ib.*)
- 7 (U. S. Sup. Ct., 1890). A national bank went into voluntary liquidation in September, 1873. Before that it had become liable to a State bank as guarantor on sundry notes made by a third person, and which were discounted for it by the State bank. In August, 1874, transactions took place between the maker of the notes and the State bank and the person who acted as the president of the national bank whereby the maker was released from further liability on the notes, but such acting president attempted to continue by agreement the liability of the national bank as guarantor. In a suit begun in October, 1876, a judgment on the guaranty was obtained in May, 1880, by the State bank against the national bank. In a suit brought by a creditor against the national bank and its stockholders to enforce their statutory liability for its debts, the court, on an application made in June, 1887, inquired into the liability of the stockholders to have the claim of the State bank enforced as against them in view of the transactions of August, 1874, and disallowed that claim. *Held*, (1) it was proper to reexamine the claim; (2) the judgment against the bank was not binding on the stockholders, in the sense that it could not be reexamined; (3) the guaranty of the bank was released as to the stockholders by the release of the maker of the notes; (4) the rights of the stockholders could not be affected by the acts of the president done after the bank had gone into liquidation. (*Schrader v. Manufacturers' National Bank of Chicago*, 133 U. S., 67.)

## POWERS—Continued.

## POWER TO MAKE CONTRACT OF GUARANTY—continued.

- 8 (Nebr., 1896). Where one purchased negotiable paper from the president of a bank with a guaranty of payment executed by him apparently in behalf of the bank, on his representation that the paper belonged to the bank, and the transaction occurred in the banking house where the president was apparently engaged in performing his duties as such, the bank was liable on the guaranty. (*City National Bank of Hastings v. Thomas*, 65 N. W., 895; 46 Nebr., 861.)

*Contract of guaranty by bank is ultra vires.*

- 9 (U. S. C. C. A., 1899). A national bank advised plaintiff that it would pay all checks of a third person, although such person had no funds on deposit, as was known to both plaintiff and the bank. In reliance on such promise, plaintiff cashed checks of such person and transmitted them to the bank for payment. The bank issued and sent to plaintiff its drafts on a correspondent for the amount of the checks, which drafts were refused payment. *Held*, that the contract was one purely of guaranty, and was ultra vires on the part of the bank, and the transaction gave plaintiff no right of action against it on the drafts. (*Bowen v. Needles Nat. Bank*, 94 Fed. Rep., 925.)
- 10 (Iowa Sup., 1899). When a letter of credit from a national bank is not purchased, but is merely a guaranty of the payment of an account to be created in the future, it is not binding on the bank, as such an institution has no power to thus jeopardize its capital. (*Thilmany v. Iowa Paper Bag Co. et al.*, 2 Banking Cases, 97; 108 Iowa, 333.)
- 11 (N. H. Sup., 1882). No action may be maintained against a national bank upon a contract made by its cashier on its behalf to guarantee a contract between third persons for delivery of building materials. (*Norton v. Derry Nat. Bank*, 3 N. B. C., 568; 61 N. H., 589.)
- 12 (Tex. Civ. Appls., 1900). A purchaser of drafts with bills of lading covering corn shipped to plaintiff for sale on commission sent the drafts to defendant national bank for collection, with instructions to deliver each bill of lading only on payment of the draft attached thereto. Plaintiff would not accept the corn, and the purchaser wrote to the bank, authorizing it to accept drafts drawn by plaintiff on the shipper in part payment of the drafts attached to the bills of lading, representing differences in the price for which the corn was sold; but the plaintiff paid the original drafts to the bank in full, and drew on the shipper for the difference, which drafts the bank promised to pay, without authority from the purchaser, and without consideration, and which drafts the shipper refused to pay when presented. *Held*, that since a national bank has no power to loan its credit, except in the ordinary course of banking, defendant bank was not liable on the drafts drawn on the shipper for the differences, and therefore an action could not be maintained on them against the purchaser (who was a resident of another county) in the county of the bank's domicile by joining it as a party defendant. (*Groos v. Brewster*, 55 S. W. Rep., 590.)

*When bank will not be allowed to plead that contract was ultra vires.*

- 13 (N. C., 1901). A contract of guaranty by a national bank can not be avoided on the ground of ultra vires. Parties to a contract which has been wholly or partially executed will not be allowed to say it was ultra vires. (*Hutchins v. Planters' National Bank of Richmond*, 128 N. C., 72.)
- 14 (Tex. Civ. Appls., 1901). When a contract between a national bank and another party has been fully performed and the bank received a benefit from such performance it is *held*, estopped to plead that the contract was ultra vires, as being in excess of its corporate powers. (*First National Bank of Greenville v. Greenville Oil and Cotton Co.*, 24 Tex. Civ. Appls., 645.)

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS.

## GENERALLY.

*When bank may not retain purchased bonds.*

- 1 (U. S. Sup. Ct., 1891). The national bank act does not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without legal authority to make. Although the bank is not bound to surrender possession of them until reimbursed the full amount due to it, and may hold them as security for the return of the consideration paid, yet when such amount is returned, or tendered back to it, and the return of the bonds demanded, its authority to retain them no longer exists; and from the time of such demand and its refusal to surrender the bonds to the vendor or owner it becomes liable for their value upon grounds of implied contract, apart from the original agreement under which it obtained them. It could not rightfully hold them under or by virtue of the contract and at the same time refuse to comply with the terms of purchase. (*Logan County National Bank v. Townsend*, 139 U. S., 67.)

*May not prospect for ore.*

- 2 (U. S. C. C. A., 1899). It is ultra vires of a national bank to expend its money in prospecting for ore on its property. (*Cooper et al. v. Hill*, 1 Banking Cases, 524; 94 Fed. Rep., 582.)

*May not agree to procure insurance business for a customer.*

- 3 (Mass., 1896). Under Revised Statutes United States, section 5136, clauses 3, 7, empowering a national bank to make contracts and to exercise all powers necessary to carry on the banking business, an agreement by a national bank to procure a person applications for insurance if he would procure for it a customer is ultra vires. (*Dresser v. Traders' National Bank*, Mass., 42 N. E., 567; 165 Mass., 120.)

*May not apply collection otherwise than as directed.*

- 4 (Tex. Civ. Appls., 1894). A bank which receives drafts with instructions to apply the proceeds to the payment of a certain note held by it for collection can not apply them to any other account. (*First National Bank v. Munzesheimer*, 26 S. W., 428.)

## WHEN ULTRA VIRES CONTRACTS WILL BE ENFORCED.

*When ultra vires contract will be enforced.*

- 1 (U. S. C. C. A., 1899). A contract entered into by a corporation which is ultra vires of its character can not be ratified or become binding on the ground of estoppel, and the only ground on which the corporation can become liable to the payment of money on account of such a contract, which has been performed by the other party, is that it has received a benefit or advantage thereby which it can not justly retain. (*Bowen v. Needles National Bank*, 94 Fed. Rep., 925.)

*Ultra vires acts—Right to plead.*

- 2 (U. S. C. C. A., 1904). Where a contract by which a national bank assumed all the obligations of an insolvent bank in contemplated liquidation was fully explained at a meeting at which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by Revised Statutes, sections 5220, 5221 (U. S. Comp. St. 1901, p. 3503), the stockholders were not thereafter entitled to claim that such contract was ultra vires. (*George et al. v. Wallace et al.*; *Brownlee et al. v. Same*; *Morsman v. Same*; *Poppleton v. Same*; *Morton et al. v. Same*; *McCague Inv. Co. et al. v. Same*, 135 Fed. Rep., 286.)

*Ultra vires, when no defense.*

- 3 (Ill.). By authority of the directors of a national bank in Chicago, which had acquired some of its own stock, the individual note of its

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## WHEN ULTRA VIRES CONTRACTS WILL BE ENFORCED—continued.

cashier, secured by a pledge of that stock, was, through a broker in Portage, sold to a bank there. The note not being paid at maturity, the Portage bank sued the Chicago bank in assumpsit, declaring specially on the note, which it alleged was made by the bank in the cashier's name, and also setting out the common counts. The bank set up that the purchase of its own stock was illegal, and that money borrowed to pay a debt contracted for that purpose was equally forbidden by Revised Statutes, section 5201. The trial court was requested by the Chicago bank to rule several propositions of law, and declined to do so. Judgment was then entered for the Portage bank. The supreme court of the State of Illinois held that the Portage bank was entitled to recover under the common counts, and that it was not necessary to consider whether the trial court had ruled correctly on the proposition of law submitted to it. *Held*, that that court, in rendering such judgment, denied no title, right, privilege, or immunity specially set up or claimed under the laws of the United States, and that the writ of error must be dismissed. (*Chemical National Bank of Chicago v. City Bank of Portage*, 156 Ill., 149.)

4 (Mo. Sup., 1902). A person borrowing money from a bank through its president can not deny the authority of the president either to loan the money to him or to dictate the terms of such loan. (*Roe v. Bank of Versailles*, 67 S. W. Rep., 303; 4 Banking Cases, 474; 167 Mo., 406.)

5 (N. Y.). Where a bank received the proceeds of a sale of bonds held by it for speculative purposes, accomplished by means of fraud on the part of its managing officers, it can not escape liability on the ground that the acts of the officer were individual acts and its business of buying and selling bonds was not within the scope of its powers. (*Carr v. Nat. Bank and Loan Co.*, 167 N. Y., 375.)

*Executed ultra vires contracts, when not void.*

6 (N. Dak. Sup., 1900). A contract of a corporation that is ultra vires, not because prohibited by positive law, or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party. (*Tourtlot v. Whitehead*, 84 N. W. Rep., 8; 3 Banking Cases, 15.)

## BANK MAY NOT REPUDIATE UNAUTHORIZED CONTRACT AND RETAIN ITS FRUITS.

1 (U. S. Sup. Ct., 1900). H., as vice-president of a Cincinnati bank, made application to a New York bank for a loan of \$300,000. The request was granted, and that amount was placed to the credit of the Cincinnati bank upon the books of the New York bank. Immediately thereafter H. fraudulently caused himself to be personally credited upon the books of his own bank with a like sum of \$300,000. The action of H. in negotiating the above loan with the New York bank was unauthorized by the board of directors of the Cincinnati bank, but after the arrangement had been made that bank drew out by check the money that had been placed to its credit by the New York bank and used the same in discharging its valid obligations. *Held*, that by so using the money obtained from the New York bank by H. in his capacity of vice-president the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The fraud perpetrated by H. upon his own bank, in having

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## BANK MAY NOT REPUDIATE UNAUTHORIZED CONTRACT AND RETAIN ITS FRUITS—continued.

himself personally credited upon its books with the amount of the loan was a matter with which the New York bank had no connection, and its right to recover could not be affected thereby. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H., who assumed to represent it. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others without incurring liability for so doing. This case and *Western National Bank v. Armstrong* (152 U. S., 346), distinguished. (*Alldrich v. Chemical Nat. Bank*, 176 U. S. Rep., 618.)

2. (U. S. Sup. Ct., 1879). Where officer of a bank guaranteed payment in name of bank and sold the note, the bank by retention and enjoyment of the proceeds is estopped to deny the officer's act. (*People's Bank v. National Bank*, 101 U. S., 181.)
- 3 (U. S. C. C. A., 1896). A bank which causes property owned by it to be conveyed by a deed regular in form to a worthless corporation, organized by its own directors, and then loans such corporation money, takes its notes and discounts them with strangers, by representing them as prime paper and on the strength of such corporation's apparent ownership of such property, is thereafter estopped, as against the holders of the notes, to assert that the conveyance was ultra vires. (*Butler et al. v. Cockrill*, 73 Fed. Rep., 945.)
- 4 (U. S. C. C. A., 1896). A national bank purchased the stock of a dealer in wall paper at a sale under an execution in its favor, and afterwards organized a corporation to take and dispose of this stock, such corporation being managed by the officers of the bank and controlled by it. In order to dispose of the stock with advantage, new stock was purchased on credit, the bank, through its cashier, informing the seller, upon inquiry, of the relation between the bank and the corporation, and that the bank would see that the bills were paid if the goods were sold. *Held*, that whether or not it was within the powers of the bank to purchase new stock to help the sale of that bought on execution sale, the bank having received and appropriated the proceeds of the goods purchased, was estopped to set up in a suit for the price a want of power to make the purchase. (*American National Bank v. National Wall Paper Co.*, 77 Fed. Rep., 85.)
- 5 (Ill.). Where a national banking association has entered into a contract which it is not authorized to make, a party who has enjoyed the benefit of such contract can not question its validity. (Ill.) *German National Bank v. Meadowcroft*, 95 Ill., 124.
- 6 (Ky., 1895). A corporation which received and used the proceeds of a discount of notes by its president is estopped to deny his authority to discount the paper. (*German National Bank v. Louisville Butchers' Hide and Tallow Co.*, 29 S. W., 882; 97 Ky., 34.)
- 7 (N. Y. Sup., 1876). A national bank indorsed upon a contract of sale and delivery between A and B that B had deposited \$2,500 in the bank, "to be held by us as collateral security for the faithful fulfillment of the within contract." *Held*, (1) that the bank had the power to receive the deposit and enter into the said contract; (2) but that, even if the contract was ultra vires, the bank would be estopped from setting up that defense in action by A, as he performed his part of the agreement, relying on the undertaking of the bank. (*Bushnell v. The Chatauqua County Nat. Bank*, 10 Hun, 378; 1 N. B. C., 794.)
- 8 (Ohio). A bank which becomes absolute owner of shares of a joint stock company taken by it as security for a loan can not set up in defense to liability for the company's debts that the ownership of such shares

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## BANK MAY NOT REPUDIATE UNAUTHORIZED CONTRACT AND RETAIN ITS FRUITS—continued.

was ultra vires because making the bank a partner in the joint stock company. (*Wehrman v. McFarlan*, 6 Ohio N. P., 333.)

9. (Tex. Civ. App., 1898). Where a national bank has acted as a partner in the sale of horses and has shared in the profits of such sale, it is estopped from denying its power to enter into such partnership when attempting to enforce the collection of the notes given by the purchaser for the property. (*Gill v. First Nat. Bank*, 1 Banking Cases, 28.)
- 10 (Tex. Civ. App., 1901). A national bank which has received and retained the fruits of its contract to pay for goods sold on its credit and delivered to a depositor in pursuance of the contract can not avoid payment on the ground that the contract was ultra vires. (*First Nat. Bank v. Greenville Oil and Cotton Co.*, 60 S. W. Rep., 828; 24 Texas Civ. App., 645.)
- 11 (Wash.). Where a bank has received and retained the benefit of a contract made by its officers, it can not plead that the contract was unauthorized by the directors or beyond the power of the bank or its officers to make. (*Tootle et al. v. First National Bank of Port Angeles*, 33 P., 345; 6 Wash., 181.)

*Bank liable for money had and received, though transaction ultra vires.*

- 12 (Ill.). The First National Bank of Decatur having advanced a sum of money to the owner of a lot of whisky, the latter employed the bank to ship the whisky for him to New York to be sold, and out of the proceeds the bank was to retain the money advanced and a reasonable commission for shipping and selling. The whisky was shipped and sold accordingly, and the proceeds received by the bank. *Held*, that the bank was liable to the owner of the whisky for the money so received, and this independently of the question whether national banks are, by their charters, authorized to sell produce on commission. (*First National Bank of Decatur v. Priest*, 50 Ill., 321.)
- 13 (Ill. Sup., 1895). A bank obtained a loan from plaintiff, giving therefor the personal note of its cashier. *Held*, that the bank was liable to plaintiff for the amount of the loan, on account for money had and received. (*Chemical National Bank of Chicago v. City Bank of Portage*, 40 N. E., 328; 156 Ill., 149.)
- 14 (Ill. Sup., 1895). A debt incurred by a national bank, for which it receives and retains the consideration, is not void because incurred in violation of Revised Statutes United States, section 5202, providing that no national bank shall be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in, except on circulation, deposits, special funds, or declared dividends. (Ib.)
- 15 (Mass., 1894). Where money is deposited with the cashier of a bank under an agreement that it shall be invested by the bank in bonds and stocks, the bank is liable for the return of the money, no investment having been made, though the agreement for its investment by the bank was ultra vires. (*L'Herbette v. Pittsfield National Bank*, Mass., 38 N. E., 368; 162 Mass., 137.)

## WHEN NATIONAL BANK MAY PLEAD THAT ITS ACT WAS ULTRA VIRES.

*When receipt of fruits of ultra vires contract does not estop.*

- 1 (U. S. Sup. Ct., 1899). The investment by the First National Bank of Concord, N. H., of a part of its surplus funds in the stock of the Indianapolis National Bank, of Indianapolis, Ind., was an act which it had no power or authority in law to do, and which is plainly against the meaning and policy of the statutes of the United States and can not be countenanced; and the Concord corporation is not liable to the receiver of the Indianapolis corporation for an assessment

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## WHEN NATIONAL BANK MAY PLEAD THAT ITS ACT WAS ULTRA VIRES—continued.

upon the stock so purchased, made under an order of the Comptroller of the Currency to enforce the individual liability of all stockholders to the extent of the assessment. The doctrine of estoppel does not apply to this case. (*First National Bank of Concord v. Hawkins*, 174 U. S., 364.)

- 2 (Ind. Sup., 1894). The fact that a party to a contract which is void as against public policy has received the benefits therefrom does not estop him, when sued thereon, from setting up such defense. (*Brown v. First National Bank of Columbus*, 37 N. E., 158; 137 Ind., 655.)

## WHEN ONLY UNITED STATES MAY COMPLAIN OF ULTRA VIRES ACT.

- 1 (U. S. Sup. Ct., 1892). Where the provisions of the national banking act prohibit certain acts by banks or their officers without imposing any penalty or forfeiture applicable to particular transactions which had been executed, their validity can be questioned by the United States only, and not by private parties. (*Thompson v. St. Nicholas National Bank*, 146 U. S., 240.)
- 2 (Cal., 1898). The question whether a national bank may loan money, taking a trust deed as security, can not be raised by a borrower, but only by the United States. (*Camp v. Land*, 54 Pac. Rep., 839; 122 Cal., 167.)
- 3 (Ill.). The fact that a contract made by a national bank is ultra vires because in violation of the national bank act can not be set up in defense to an action growing out of such contract. (*Volz v. Nat. Bank*, 158 Ill., 532.)
- 4 (Mich. Sup., 1898). A mortgage on real estate taken by a national bank in violation of the national banking act is not invalid. (*Fifth National Bank of Grand Rapids v. Pierce*, 75 N. W. Rep., 1058; 117 Mich., 376.)
- 5 (Minn.). The objection that an executed purchase of property by a national bank is ultra vires can be urged only by the Government of the United States. (*Hennessy v. City of St. Paul et al.*, 55 N. W., 1123; 54 Minn., 219.)
- 6 (Miss., 1897). In an action by a national bank on railroad-aid bonds the United States alone can complain that the bank was not authorized to hold such bonds. (*Town Council of Lexington v. Union National Bank*, 22 So., 291; 75 Miss., 1.)
- 7 (Mo. Sup., 1898). The acceptance of a deed in trust by a national bank, though ultra vires, does not make the conveyance void, but only voidable. Only the sovereign can interfere. (*Hall v. Farmers and Merchants' Bank*, 46 S. W. Rep., 1000; 145 Mo., 418.)
- 8 (Mo.). Though a national bank is forbidden to loan money on real estate security, it can enforce such security if taken; and where it takes a note without knowledge that it is so secured, it has the right to claim and enforce the same when afterwards discovered. (*George v. Somerville*, 54 S. W. Rep., 491; 153 Mo., 7.)
- 9 (S. Dak. Sup., 1895). Want of authority in plaintiff national bank to purchase a negotiable note can not be urged by the maker of the note in defense. (*First National Bank of Pierre v. Smith*, 65 N. W., 437; 8 S. Dak., 7.)
- 10 (Tex. Civ. App., 1896). A national bank having joined with other persons in a partnership to operate a mill, can not be estopped from recovering moneys loaned to the firm on the ground that it had no authority to become a partner. (*Cameron v. First Nat. Bank*, 34 S. W. Rep., 178.)



## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## WHEN ULTRA VIRES ACT AMOUNTS TO CONVERSION.

- 1 (U. S. Sup. Ct., 1899). A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owner for their value, as for a conversion, even though it was not within its power to sell them as the owner's agent. (*First National Bank of Grand Forks v. Anderson*, 172 U. S., 573.)
- 2 (U. S. C. C. A., 1899). The fact that a contract, made by a national bank, to receive and collect securities, and reinvest the proceeds for the owner, contained provisions which were ultra vires, does not relieve the bank of the legal obligation to return the securities or account to the owner for their value. (*Emmerling v. First Nat. Bank*, 97 Fed. Rep., 739.)
- 3 (Ill. Sup., 1880). A national bank which has wrongfully converted to its own use the property of another is estopped from denying its liability to account therefor upon the ground that it received and held the property in carrying on the business of a warehouseman, outside the powers conferred by its charter. (*German Nat. Bank v. Meadowcroft*, 2 N. B. C. (addenda), 462; 95 Ill., 124.)
- 4 (N. Dak. Sup., 1896). A national bank which assumed to sell for another certain notes owned by him, but which, instead of selling them to a third person, without his knowledge sold them to himself, violated its duty to the owner, the same as if it had full power under the law to act as such agent, and was, therefore, guilty of a conversion of such notes, notwithstanding its agency was ultra vires. (*Anderson v. First National Bank of Grand Forks*, N. Dak., 67 N. W., 821; 5 N. Dak., 80.)

## ULTRA VIRES REPRESENTATIONS BY BANK.

- 1 (U. S. C. C. A., 1902). The cashier of a bank is the proper officer to receive deposits and to give certificates or vouchers in respect thereto, which may properly include, with the consent of the depositor, a statement of the source from which the deposit arose; and for a false statement in that respect, made to subserve the interests of the bank, the latter is liable in tort to one injured thereby, although the cashier was not expressly authorized to make such statement by the board of directors. (*Hindman v. First National Bank of Louisville et al.*, 112 Fed. Rep., 931.)
- 2 (U. S. C. C. A., 1902). To sustain an action for fraud and deceit, based on false representations by defendant, by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false and (2) that the person making it knew it to be false; but if the fact was one within his means of knowledge, and he had no knowledge of it, a jury is authorized to find that the statement was knowingly false. (*Ib.*)
- 3 (Col. Sup., 1898). Although it was no part of the business of the defendant bank to make representations or statements regarding the financial responsibility of C., or the value of certain mining stock, if they were false, and made in pursuance of an agreement with C., and indirectly for the benefit of the bank, and such benefit was received and retained by the bank, it could not escape liability upon the ground that it was ultra vires on its part to make the representation. (*American Nat. Bank of Denver v. Hammond*, 1 Banking Cases, 409; 25 Colo., 367.)
- 4 (Wash., 1899). A national bank or other corporation may be liable in a civil action, at the suit of the injured party, for every wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transactions may be, in such cases the doctrine of ultra vires having no application. (*Pronger v. Old Nat. Bank*, 1 Banking Cases, 399; 20 Wash., 618.)

## POWERS—Continued.

## ULTRA VIRES ACTS AND CONTRACTS—Continued.

## ULTRA VIRES REPRESENTATIONS BY BANK—continued.

- 5 (Wash., 1899). In an action against a national bank, its president and cashier, for damages arising from fraud alleged to have been perpetrated upon plaintiff by defendants, it appeared that certain notes were the property of the bank; that the notes were worthless, the payor being insolvent; and that defendants, without the consent of plaintiff, caused the notes to be forwarded to him, and his account with the bank to be charged with the face value of the notes, falsely representing that the notes were taken for a loan of plaintiff's money made by one of defendants to the maker of the notes, that the maker was insolvent, and that the notes would be paid on demand; and that the plaintiff was injured thereby to the amount of the verdict. *Held*, that the evidence made a prima facie case against defendants. (Ib.)

## ILLEGAL CONTRACTS—DEFENSES.

- 1 (U. S. C. C. A., 1901). An action can not be maintained on a contract that is illegal or against public policy, where both parties are equally culpable. (*Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. Rep., 421.)
- 2 (U. S. C. C. A., 1901). A contract in whose consideration and performance nothing illegal or against public policy inheres may be enforced although it may incidentally aid one in evading or violating a law. (Ib.)
- 3 (U. S. C. C. A., 1901). Where a statute commands certain parties to do, or prohibits them from doing, certain acts, and prescribes the penalties for their violation of its commands, courts may not inflict other penalties for its violation upon other parties not named in the law by the avoidance of their contracts. (Ib.)
- 4 (U. S. C. C. A., 1901). One who has received the benefits of the performance by the plaintiff of a contract which was neither *malum in se* nor *malum prohibitum* can not successfully defend an action for the payment of his indebtedness arising therefrom on the ground that he intended to do some illegal act, which was neither a part of the consideration or of the performance of the agreement. (Ib.)

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*Preference of bank as creditor of individual.*

- 1 (U. S. C. C. A., 1898). A bank holding a large portion of the stock of a bank indebted to it as security for the debt is entitled to use its influence to induce the corporation to sell its effects and apply the proceeds to the extinguishment of such debt, a private corporation having, as a general rule, the same power to prefer creditors as that possessed by an individual. (*Nat. Bank of Commerce in Denver v. Allen et al.*, 1 Banking Cases, 53; 90 Fed. Rep., 545.)
- 2 (Ky. Appls., 1901). Where an insolvent debtor deposited in bank an amount almost exactly equal to the amount of a note which the bank held against him, and the deposit was applied by the bank to the payment of the note, the making of the deposit was, in effect, a payment to the bank, and therefore an act of preference, under the statute, as no inquiry was ever thereafter made by the debtor as to the deposit, and he must have known when he made it that the bank was bound in law to apply it to the payment of the note or release the surety therein. (*Mt. Sterling Nat. Bank v. Priest et al.*, 64 S. W. Rep., 972; 4 Banking Cases, 41.)

## PREFERENCES—Continued.

*When payment by third person invalid.*

- 3 (Ala., 1896). The directors of an insolvent corporation, being liable as indorsers upon certain indebtedness owing to a bank, transferred the property and assets of the corporation to one of their number, who assumed all the debts and agreed to pay the same in eighteen months. The assignee sold a portion of such assets to E., who gave the bank a note for the purchase price, secured by mortgage on the property, and the amount of the note was credited upon the debt due to the bank by the corporation. *Held*, that the transaction was fraudulent and void as to other creditors. (*Berney National Bank v. Guyon*, 20 So., 520; 111 Ala., 491.)

*Dividends, when part of claim secured by mortgage.*

- 4 (Ill. Sup.). Where a claim proved against the estate of an insolvent consists of two items, one of which is secured by mortgage, and is afterwards paid in full out of the proceeds of the mortgaged property, it is error after such payment to order that the claimant be paid dividends proportioned to his entire claim as proved, instead of to the residue of his claim. (In re Bates, 9 N. E., 257; 118 Ill., 524, distinguished. *First National Bank of Peoria v. Commercial National Bank of Peoria*, Ill. Sup., 37 N. E., 1019; 151 Ill., 308.)

*Lien of attachment.*

- 5 (Mo. Sup., 1894). Though a corporation is insolvent, a creditor not connected with the corporation may obtain preference, before a court of equity obtains jurisdiction over it for winding up its affairs, by attaching the property of the corporation, though he is advised so to do by a director of the corporation. (*La Grange Butter Tub Co. v. National Bank of Commerce*, 26 S. W., 710; 122 Mo., 154.)

*When labor claims have not priority over mortgage.*

- 6 (Tex. Civ. App., 1896). Where a railroad company is in the hands of a receiver, though at the instance of the holders of a mortgage, the court has no power to appropriate the corpus of the property to the payment of claims for operating expenses in preference to the prior mortgage debts, in the absence of a statute, at the time the mortgage was executed, giving such claims a prior lien on the corpus of the property. (*Farmers and Merchants' National Bank v. Waco Electric Railway and Light Co.* (Tex. Civ. App.), 36 S. W., 131; *Metropolitan Trust Co. v. Farmers and Merchants' National Bank*, ib.)

## CONSTRUCTION OF STATE STATUTES RELATING TO FRAUDULENT CONVEYANCES.

*What construction accepted.*

- 1 (U. S. Sup. Ct., 1890). This court accepts the construction given to a State statute against fraudulent conveyances by the highest court of the State as controlling. (*Peters v. Bain*, *Griffin v. Peters*, 133 U. S., 670.)

*Construction of Massachusetts statute as to fraudulent conveyances.*

- 2 (U. S. Sup. Ct., 1896). The provisions of sections 96 and 98 of chapter 157 of the public statutes of Massachusetts, invalidating preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency, do not conflict with the provisions contained in Revised Statutes, sections 5136 and 5137, relating to national banks and to mortgages of real estate made to them in good faith by way of security for debts previously contracted, and are valid when applied to claims of such banks against insolvent debtors. *National Bank v. Commonwealth* (9 Wall., 353) affirmed to the point that it is only when a State law incapacitates a national bank from discharging its duties to the Government that it becomes unconstitutional; and *Davis v. Elmira Savings Bank* (161 U. S., 275) affirmed to the point that national banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the

## PREFERENCES—Continued.

## CONSTRUCTION OF STATE STATUTES RELATING TO FRAUDULENT CONVEYANCES—cont'd.

paramount authority of the United States, and the two distinct propositions held to be harmonious. (*McClellan v. Chipman*, 164 U. S., 347.)

*Construction of Pennsylvania statute—Fraudulent conveyance—Necessity of recording—Conveyance in trust under Pennsylvania statute.*

- 3 (U. S. C. C. A., 1902). The provision of act of Pennsylvania March 24, 1818, requiring all assignments in trust by debtors on account of inability at the time to pay their debts to be recorded within thirty days, and declaring them to be void if not so recorded, does not apply to a transfer made directly to a creditor for his benefit alone, and the transfer of property to the receiver of a national bank to secure a debt due to the bank is, in effect, one to the bank itself and not in trust and is not within the statute. (*McCartney et al. v. Earle*, 115 Fed. Rep., 462.)

*Same—Preferential conveyance—Fraudulent intent.*

- 4 (U. S. C. C. A., 1902). No presumption of a fraudulent intent to hinder and delay other creditors arises from a transfer of property as security to a bona fide creditor whose debt is due, although it is understood by the parties that the effect of the transfer will be to give such creditor a preference, nor can such an intent be inferred from a provision of the instrument of transfer that the property shall be returned in case a certain contemplated adjustment of the affairs of the debtor shall be made, which provision is favorable to other creditors. (Ib.)
- 5 (U. S. C. C. A., 1902). Evidence held insufficient to establish the invalidity of a transfer of property by an insolvent debtor to the receiver of a national bank by way of security for a debt due the bank, either on the ground of undue influence, duress, a fraudulent intent to hinder and delay creditors, or the insanity of the debtor. (Ib.)

*Construction of Virginia statute as to fraudulent conveyances.*

- 6 (U. S. Sup. Ct., 1890). It is settled law in Virginia that an assignment by a debtor for the benefit of creditors will not be declared void as given "with intent to delay, hinder, or defraud creditors, purchasers," etc., unless such an inference is so irresistible as to preclude any other; that the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, and that one creditor may be preferred over another. (*Peters v. Bain, Griffin v. Peters*, 133 U. S., 670.)
- 7 (U. S. Sup. Ct., 1890). When an assignment for the benefit of partnership and individual creditors includes all the property of the grantors, as partners and individually it should be construed distributively, partnership assets being applied to the payment of partnership debts and individual assets to individual liabilities. (Ib.)
- 8 (U. S. Sup. Ct., 1890). As respects fraud in law, as distinguished from fraud in fact, in a conveyance, if that which is invalid can be separated from that which is valid without defeating the general intent, the maxim "Void in part, void in toto" does not necessarily apply, but the instrument may be sustained notwithstanding the invalidity of a particular provision. (Ib.)
- 9 (U. S. Sup. Ct., 1890). An assignment for the benefit of creditors, with preferences, authorized the trustees to "make sale of the real and other personal estate hereby conveyed, at public auction or private sale, at such time or times, and place or places, and after such notice as to them shall seem best, and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold, and

## PREFERENCES—Continued.

## CONSTRUCTION OF STATE STATUTES RELATING TO FRAUDULENT CONVEYANCES—cont'd.

- pay the said trustees therefor, at its full face value, the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money, and to enable as many creditors as possible to become bidders on these terms, the said trustees may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best." *Held*, that the deed was not void in law because of the insertion of this provision. (Ib.)
- 10 (U. S. Sup. Ct., 1890). The individual members of a private banking house, who were also the controlling directors in a national bank, made an assignment of their property for the benefit of creditors, which assignment was assailed as fraudulent in several matters, among which were alleged frauds upon the national bank, and frauds upon their own depositors previous to the assignment. *Held*, that violations of their fiduciary relations to the bank, or their treatment of their own depositors, did not render the assignment of all their property for the benefit of their creditors fraudulent for that reason. (Ib.)
  - 11 (U. S. Sup. Ct., 1890). The knowledge by a director and stockholder in a national bank that the bank is insolvent does not invalidate an assignment of all his property for the benefit of his creditors, with preferences made with such knowledge. (Ib.)
  - 12 (U. S. Sup. Ct., 1890). The court below was right in finding no evidence in this case of a fraudulent intent on the part of the firm or either of its members to hinder and delay their creditors. (Ib.)
  - 13 (U. S. Sup. Ct., 1890). The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver. *Held*, (1) that the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank as he might elect, but that purchases made and paid for out of the general mass could not be claimed by the receiver unless it could be shown that moneys of the bank in the general fund at the time of the purchase were appropriated for that purpose; (2) that the receiver was not estopped by such election and taking from receiving the full benefit of the deed of trust in favor of the national bank. (Ib.)
  - 14 (U. S. Sup. Ct., 1890). In Virginia, trustees and beneficiaries in a deed of trust to secure bona fide debts occupy the position of purchasers for a valuable consideration. (Ib.)
  - 15 (U. S. Sup. Ct., 1890). When the counsel of an insolvent debtor draws an assignment of his client's property to himself as trustee for the benefit of creditors, he may be presumed to have had knowledge of the dealings of the insolvent with his creditors. (Ib.)
  - 16 (U. S. Sup. Ct., 1890). Under the circumstances of this case a decree directing the payment of the costs of suit out of the trust fund is correct. (Ib.)
  - 17 (U. S. C. C. A., 1901). Under the laws of Virginia as they existed in 1896, a debtor, although insolvent, had the right to prefer certain creditors, if done in good faith and for a valid consideration, and such preferences are not invalid because they operate to hinder and delay other creditors. (*Kemp et al. v. Nat. Bank of the Republic of New York*, 3 Banking Cases, 652; 109 Fed. Rep., 48.)

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*Fraudulent conveyance of realty.*

- 1 (U. S. C. C. A., 1900). Deeds executed by one who was largely indebted as indorser of notes of a corporation in which he was a stockholder, conveying property to his children, for a consideration that was not inadequate, and which was fully paid by taking up such of the obligations upon which the father was indorser as he directed, are not fraudulent as to other creditors of the grantor, where preferences were permitted by the laws of the State, nor are they rendered fraudulent by the fact that after their delivery they were withheld from record, by one to whom they were intrusted to be recorded, in the interests of the corporation, to enable it to secure renewals of other notes or new loans on the credit of the grantor as indorser, where such withholding was not in pursuance of any agreement between the parties, and was without the direction or knowledge of the grantees. (*Corwine et al. v. Thompson Nat. Bank of Putnam et al.*, 105 Fed. Rep., 196.)
- 2 (U. S. C. C. A., 1900). A grantee of land conveyed to her by her father for an adequate consideration authorized her husband to act for her in the transaction. The father was an indorser in a large amount for an insolvent corporation in which both he and the grantee's husband were interested. The conveyance, together with others made at the same time to other children, included practically all the grantor's property, and the consideration received therefor was applied in payment of certain of the notes on which he was liable. After the delivery of the deeds they were intrusted to a third person to be recorded, but at the instance of the grantee's husband he withheld them from record for several months, during which time the husband, by concealing the fact of the conveyances from the creditors of the corporation, secured further renewals of its notes as well as new loans upon the indorsement of the grantor. *Held*, that as against those who were so induced to renew their notes to make loans on the faith of the indorser's solvency, such grantee was estopped by the acts of her agent to claim title to the property, and as to such creditors the deed to her was void. (*Ib.*)
- 3 (U. S. C. C. A., 1900). Where a daughter, who owned an undivided three-fourths interest in certain lands, the other one-fourth being owned by her father, had made valuable improvements on such lands, and a conveyance to her by her father of his one-fourth interest was held void as against his creditors, she is entitled to an allowance for the enhanced value of such interest by reason of her improvements. (*Ib.*)

REAL ESTATE—Continued.

*Presumption of regularity of bank's proceedings.*

- 4 (U. S. C. C. A., 1896). The fact that trustees holding lands in trust for a national bank formally and regularly execute a deed thereof to a third party itself raises a presumption that the deed was made pursuant to a regular resolution of the bank's board of directors, and the deed must be *held* sufficient to convey the legal title where there is nothing to rebut the presumption. (*Butler et al. v. Cockrill*, 73 Fed. Rep., 945.)

*When secret trust in realty void.*

- 5 (Ill.). Where one conveys property to another and by some secret agreement retains an interest, such conveyance is fraudulent as to subsequent creditors. (*Hutchinson National Bank v. Crow*, 56 Ill. App., 558.)

*Action to make judgment effective against realty.*

- 6 (Nebr. Sup., 1900). A judgment creditor, after an execution has been issued and returned nulla bona, may maintain a suit in equity to make his judgment effective as a lien upon land by removing obstructions calculated to make an execution sale unproductive. (*First Nat. Bank of Plattsmouth v. Gibson et al.*, 84 N. W. Rep., 259; 3 Banking Cases, 61; 60 Nebr., 767.)

RECEIVERS. (*See* INSOLVENCY AND RECEIVERS.)

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REPORT OF CONDITION.

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*Form and contents of reports to the Comptroller.*

- 1 (U. S. Sup. Ct., 1895). The "liabilities" of a national bank, which are required by Revised Statutes, section 5211, to be stated in the reports of the Comptroller of the Currency, include contingent as well as absolute liabilities; and hence an unmatured note, payment of which at maturity is guaranteed by the bank, should be included in the list of liabilities. (*Cochran v. United States*, 15 S. Ct., 628; 157 U. S., 286.)
- 2 (U. S. Dist. Ct., 1892). A national bank is not required to conform the headings of the various accounts on its books to any prescribed names, nor to the names stated in the form of report prescribed by the Comptroller, and therefore when a report is called for, if the person making it enters, under the headings in the prescribed form, a statement of the bank's condition which is true with respect to the head-

## REPORT OF CONDITION—Continued.

- ings in said form, he has fulfilled the demands of the law. (*United States v. Graves*, 53 Fed. Rep., 634.)
- 3 (U. S. Dist. Ct., 1892). The entry of "Loans and discounts" in reports to the Comptroller does not guarantee the solvency of the makers of the paper, but is a statement that in truth and fact, at the date named in the report, the bank actually held and owned loans and discounts to the aggregate so reported. (Ib.)
- 4 (U. S. Dist. Ct., 1892). A director of a bank is personally liable to the bank on paper made to it by a firm of which he is a member, and in making a report of the condition of the bank to the Comptroller the amount of such paper should be entered under the heading of "Liabilities of directors (individual and firm) as payers." (Ib.)
- 5 (N. Dak. Sup., 1901). The written report of an officer of a national bank to the Comptroller of the Currency, made pursuant to section 5211, Revised Statutes of the United States, does not purport to give the actual or estimated value of the bank's property, and is incompetent, alone, as a basis from which to deduce the actual value of the bank's stock. (*Patterson v. Plummer*, 86 N.-W. Rep., 111; 3 Banking Cases, 424.)

## RESIDENCE.

*Residence.*

- 1 (U. S. C. C., 1871). It will be presumed, so far as the question of jurisdiction is concerned, that the stockholders of a national bank are citizens of the State where the bank is located. (*Manufacturers' Nat. Bank v. Baack*, 1 N. B. C., 161; 2 Abbott, U. S., 232; 8 Blatch., 147.)
- 2 (Nev. Sup., 1874). A national bank is a citizen of the State wherein it is located. (*Davis v. Cook*, 9 Nev., 134; 1 N. B. C., 656.)

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## SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS.

## WHAT IS A SHAREHOLDER.

*What is a shareholder.*

- 1 (U. S. C. C. A., 1895). A "shareholder" in a corporation, within Revised Statutes, sections 5139, 5151, creating individual liability against shareholders of national banks, is one who has a proportionate interest in its assets and is entitled to take part in and control and receive its dividends. In all essential particulars he is distinguishable from one who holds shares of stock as collateral security for a loan. (*Beal v. Essex Savings Bank*, 67 Fed. Rep., 816.)

*One may be shareholder without a certificate.*

- 2 (U. S. Sup. Ct., 1891). Subscriptions to stock and payment in full and entry of name on books as a stockholder makes subscriber a shareholder without taking out a certificate. (*Pacific National Bank v. Eaton*, 141 U. S., 227.)

## RIGHT OF SHAREHOLDER TO EXAMINE BOOKS OF BANK.

*Section 1677, Alabama Code (1886), applies to national banks.*

- 1 (Ala.). Code of Alabama, 1886, section 1677, which provides that stockholders of all corporations have the right to have access to and inspection and examination of the books, records, and papers of the corporation at all reasonable and proper times, applies to national banks located within the State; and mandamus will lie against the officer having custody of the books to enforce the right. (*Winter v. Baldwin*, 7 So., 734; 89 Ala., 583.)
- 2 (Ala.). The rights of stockholders are not curtailed, nor the statute in conflict with the United States Revised Statutes, which provide that national banks shall not be subject to visitatorial powers other than those authorized by Congress or vested in the courts of justice. (Ib.)

*A shareholder or other person having a real interest and laudable object may examine books of a bank.*

- 3 (La., 1899). A shareholder or other person with a laudable object to accomplish or a real and actual interest upon which to predicate his request for information disclosed by the books of the bank, is given by the fundamental law the right to inspect them. (*State ex rel. Burke v. Citizens' Bank of Jennings*, 1 Banking Cases, 369; 51 La. Ann., 426.)
- 4 (La., 1899). The claim that the right of inspection is strictly personal to the shareholder and can not be exercised by another for him and in his stead, as an agent or executor, is without force; for, if it were true, the possession of the right would be futile in many instances. (Ib.)
- 5 (La., 1899). A by-law of a corporation which provides that no stockholder or other person shall have the right to inspect the books without special authority from the board of directors must be subordinated to the provisions of the charter and the general and fundamental law. (Ib.)

*Notes to State ex rel. Burke v. Citizens' Bank of Jennings. 3 Banking Cases, 369. (1899.)*

6. *Right of stockholder to inspect corporate books—Common law.*—At common law stockholders have the right to examine and inspect the books and records of the corporation of which they are members, at all reasonable times, in order that they may thereby be informed of the condition of the corporation, its purpose, and business. The doctrine of the law is that the books and papers of an incorporated company, although of necessity kept in the hands of some proper officer or agent, are the property of all the shareholders.

Angell & Ames on Corporation, sec. 681;

Field on Corporations, sec. 118;

## SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS—Continued.

## RIGHT OF SHAREHOLDER TO EXAMINE BOOKS OF BANK—continued.

- Cook on Stock and Stockholders, sec. 311;  
 (La.) Cockburn v. Union Bank, 13 La. Ann., 289;  
 (N. J.) Huyler v. Cragin Cattle Co., 40 N. J. Eq., 392; 12 Am. & Eng. Corp. Cas., 159;  
 (N. J.) Rosenfeld v. Einstein, 46 N. J. L., 479;  
 (N. Y.) People v. Throop, 12 Wend., 183;  
 (Pa.) Commonwealth v. Phoenix Iron Co., 105 Pa. St., 111;  
 (Vt.) Lewis v. Brainerd, 53 Vt., 519.

*Same—Statutes* (N. Y.). And this common-law right is confirmed by statute in most of the States of this country and in England. And it has been held that the common-law right of inspection remains, although a special statutory right is also given. (*People v. Lake Shore & M. S. R. Co.*, 11 Hun, N. Y., 1.)

(Ala.) A State statute giving a stockholder right to inspect the books of a corporation applies to national banks located within the State. (*Winter v. Baldwin*, 89 Ala., 583; 31 Am. & Eng. Corp. Cas., 406.)

(Ala.) And sections 5240 and 5241, Revised Statutes of the United States, providing for national-bank examiners and the exemption of these corporations from all visitatorial powers other than those authorized by Congress or vested in courts of justice, does not affect this statutory right of the stockholder. (*Winter v. Baldwin*, 89 Ala., 583; 31 Am. & Eng. Corp. Cas., 406.)

*Same—Qualification of rule.*—The stockholders, directors, or incorporators of a corporation or banking company may, at proper times and for special and proper purposes, inspect and copy the books of the corporation or company.

(England) *Rex v. Merchant Tailors Co.*, 2 B. and Ad., 115; 22 E. C. L., 40;

(England) *In re Burton & Saddlers Co.*, 31 L. J. Q. B., 62;

(England) *Rex v. Babb*, 3 T. R., 579;

(England) *Williams v. Prince of Wales Ins. Co.*, 23 Beav., 338;

(Ala.) *Foster v. White*, 86 Ala., 467;

(La.) *Hatch v. City Bank*, 1 Rob. La., 470;

(N. J.) *Ferry v. Williams*, 4 N. J. L., 332;

(N. J.) *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq., 392; 42 N. J. Eq., 139;

(N. Y.) *Brouwer v. Cotheal*, 10 Barb., N. Y., 216; 5 N. Y., 562;

(N. Y.) *People v. Mott*, 1 How. Pr. N. Y., 247;

(N. Y.) *People v. Cornell*, 47 Barb., N. Y., 329; 35 How. Pr. N. Y., 31;

(N. Y.) *Central National Bank v. White*, 37 N. Y. Sup. Ct., 297; 70 N. Y., 220;

(Pa.) *Phoenix Iron Co. v. Com.*, 113 Pa. St., 513.

*Same—By agents.*—And such inspection may be made through an expert or other agent.

(England) *Williams v. Prince of Wales Ins. Co.*, 23 Beav., 338;

(England) *Bonnardet v. Taylor*, 1 J. & H., 386;

(England) *Draper v. Manchester, etc., R. Co.*, 7 Jur. N. S., pt. 1, 86;

(England) *In re Joint Stock Discount Co.*, 36 L. J. Eq., 150;

(England) *Attorney-General v. Whitwood*, 40 L. J. Ch., 592;

(England) *Lindsay v. Gladstone*, L. R. 9 Eq., 132;

(Ireland) *Hide v. Holmes*, 2 Moll., 372;

(Ireland) *Blair v. Massey*, L. R. 5 Ir. Eq., 623;

(Ala.) *Foster v. White*, 86 Ala., 467;

(Ga.) *Ballin v. Ferst*, 55 Ga., 546;

(La.) *State v. Bienville Oil Works Co.*, 28 La. Ann., 304;

But see—

(England) *Bartley v. Bartley*, 1 Drew, 233;

(England) *Summerfield v. Pritchard*, 17 Beav., 9;

## SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS—Continued.

## RIGHT OF SHAREHOLDER TO EXAMINE BOOKS OF BANK—continued.

(England) *Draper v. Manchester R. Co.*, 3 De G. F. & J., 23;

(England) *In re West Devon, etc.*, Mine, 27 Ch. D., 106;

(N. Y.) *Bank of Utica v. Hilliard*, 6 Cow., N. Y., 62.

*Same—Mandamus.*—The right of the shareholder to inspect the books of the company is one which he can enforce by mandamus, in the discretion of the court.

(La.) *Cockburn v. Union Bank*, 13 La. Ann., 289;

(Mass.) *St. Luke's Church v. Slack*, 61 Mass., 1 Cush., 226;

(Miss.) *American Railroad Frog Co. v. Haven*, 101 Miss., 398; 3 Am. Rep., 377;

(N. J.) *State v. Goll*, 31 N. J. L., 2 Vr., 285;

(N. Y.) *In re Sage v. Lake Shore and M. S. R. Co.*, 70 N. Y., 220;

(N. Y.) *People v. Pacific Mail Steamship Co.*, 50 Barb., N. Y., 280;

(N. Y.) *People v. Mott*, 1 How., N. Y. Pr., 247;

(N. Y.) *People v. Lake Shore and M. S. R. Co.*, 11 Hun., N. Y., 1;

(N. Y.) *People v. Throop*, 12 Wend., N. Y., 183.

- 7 (N. Y. Appls., 1902). The supreme court has power, in its discretion, to compel the officers of a national bank in process of liquidation, on expiration of its charter by limitation, to exhibit books, papers, and assets of the bank to the stockholders, and to permit them to examine and take extracts therefrom. (*Tuttle et al. v. Iron Nat. Bank of Plattsburg et al.*, 62 N. E. Rep., 761; 4 Banking Cases, 300; 170 N. Y., 9.)

- 8 (N. Y. Appls., 1902). Where the discretion of the supreme court in issuing a writ of mandamus to compel directors of a national bank in liquidation to allow stockholders to examine its books and papers has been lawfully exercised, the act will not be reviewed by the court of appeals. (Ib.)

- 9 (N. Y., 1905). Under Revised Statutes U. S., 5210, a shareholder of a national bank is entitled to examine its list of shareholders and to make extracts therefrom for the purpose of negotiating for the purchase of stock. (*People v. Consolidated National Bank*, 94 N. Y. Supp., 173.)

*Amount in dispute must exceed two thousand dollars to give United States circuit court jurisdiction in an application for a writ of mandamus to compel association to permit shareholder to examine list of shareholders.*

- 10 (U. S. C. C., 1905). On an application to a Federal court by a shareholder in a national banking association for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on Revised Statutes 5210, the pleadings must show that the matter in dispute exceeds the value of \$2,000 to give the court jurisdiction. (*Large v. Consolidated Nat. Bank*, 137 Fed. Rep., 168.)

*Original action for mandamus.*

- 11 (U. S. C. C., 1905). A Federal court has power to issue a mandamus only in the exercise of a jurisdiction where such proceeding is ancillary. (Ib.)

## RIGHTS OF SHAREHOLDERS IN GENERAL.

*Rescission of fraudulent stock sale.*

- 1 (U. S. Sup. Ct., 1901). Assuming that the defendant became a shareholder in a national bank in consequence of fraudulent representations of the bank's officers, two questions are presented for determination: 1. Whether such representations, relied upon by defendant, constituted a defense in this action, brought by the receiver only for the purpose of enforcing the individual liability imposed by section 5151, Revised Statutes, upon shareholders of national banking

## SHAREHOLDERS -Continued.

## RIGHTS OF SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS IN GENERAL—continued.

associations? which question is answered in the negative; and, 2, Can the defendant, because of frauds of the bank whereby he was induced to become a purchaser of its stock, have a judgment against the receiver, on a counterclaim for money paid by him for stock, to be satisfied out of the bank's assets and funds in his control and possession? which question is also answered in the negative. (*Lantry v. Wallace*, 182 U. S., 536.)

- 2 (U. S. Sup. Ct., 1901). The present action is at law, its object being to enforce a liability created by statute for the benefit of creditors who have demands against the bank of which the plaintiff is receiver. If the defendant was entitled, under the facts stated, to a rescission of his contract of purchase, and to a cancellation of his stock certificate, and, consequently, to be relieved from responsibility as a shareholder of the bank, he could obtain such relief only by suit in equity to which the bank and the receiver were parties. (*Ib.*)
- 3 (U. S. Sup. Ct., 1901). Whether a decree based upon the facts set forth in the answer, even if established in a suit in equity, would be consistent with sound principle, or with the statute regulating the affairs of national banks and securing the rights of creditors, is a question upon which this court does not express an opinion. (*Ib.*)
- 4 (U. S. Sup. Ct., 1901). The purchase of this stock by the bank under the circumstances was ultra vires, but that did not render the purchase void. (*Ib.*)
- 5 (U. S. Sup. Ct., 1901). If a subscriber to the stock of a national bank becomes a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped as against creditors to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position. (*Scott v. De Weese*, 181 U. S., 202.)
- 6 (U. S. C. C. A., 1899). Even though a stockholder in a national bank has been induced to become such through fraud which would render his purchase or subscription voidable as between himself and the bank, yet, if he has knowingly permitted himself to be registered upon the corporate books as a shareholder prior to its insolvency, and has remained such for any considerable length of time, and until its insolvency has intervened, he can not then be permitted to rescind his purchase or subscription so far as the corporate creditors are concerned. (*Lantry v. Wallace*, 2 Banking Cases, 314; 97 Fed. Rep., 865.)
- 7 (U. S. C. C. A., 1898). A subscription to the stock of a national bank, though induced by the fraud of its officers, is not void, but voidable only at the election of the subscriber; and where he remains and acts as a stockholder for years and receives dividends as such, and until the bank is placed in liquidation, though without knowledge of the fraud or means of ascertaining it, he can not then, as against the bank's creditors, exercise the option to rescind the contract of subscription, whatever his rights may have been as against the corporation. (*Scott v. Latimer*, 89 Fed. Rep., 843.)
- 8 (U. S. C. C. A., 1893). The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. (*Merrill v. Florida Land and Improvement Co.*, 60 Fed. Rep., 17.)
- 9 (U. S. C. C. A., 1896). While the N. bank was in embarrassed circumstances, plaintiff was induced, by the fraudulent misrepresenta-

## SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS IN GENERAL—continued.

tions of its cashier, to subscribe, in May, 1890, for 62 shares of a proposed increase of its capital stock, and to pay in a large sum of money therefor. In the following November the bank failed and the plaintiff, who lived at a distance, in another State, receiving then his first intimation that anything was wrong, proceeded to make inquiries, and, as a result, instituted proceedings before the Comptroller of the Currency to have the stock standing in his name declared void, and himself not a stockholder. These proceedings failing, he took steps in May, 1891, to have a bill filed to rescind his subscription. At the request, however, of parties who were trying to reorganize the bank, he consented to withdraw such suit, and surrender his stock to be canceled, upon an express agreement that it should be without prejudice to his right to sue the bank for the fraud by which he had been induced to subscribe and pay his money therefor. Plaintiff did not participate in the reorganization, and consistently maintained that he was not a stockholder, and that the bank was liable to him for the money paid. Upon the reorganization the creditors of the bank accepted in settlement a payment in cash and certain certificates of indebtedness. In November, 1891, plaintiff brought this action against the bank to recover the money paid by him as a deposit. In December, 1892, the bank failed again. *Held*, that the occurrence of the insolvency of the bank before the commencement of plaintiff's action did not preclude him from rescinding his subscription and recovering the money paid for his stock. (*Newton National Bank v. Newbegin*, 74 Fed. Rep., 135.)

- 10 (U. S. C. C., 1898). A subscription of stock induced by fraud may be rescinded after as well as before the corporation ceases to be a going concern, where no considerable time has elapsed since the subscription, if the subscriber has taken no active part in the management of the corporation's affairs, has been diligent in discovering the fraud and in taking steps to rescind, and where no considerable amount of corporate indebtedness has been created since the subscription, and is still unpaid. (*Wallace v. Bacon*, 86 Fed. Rep., 553.)
- 11 (U. S. C. C., 1898). An answer seeking to rescind a subscription to stock of an insolvent national bank, on the ground that it was obtained by fraud, must show that the creditor for whose benefit the assessment sought to be enforced was levied did not become such during the time defendant held such stock, and allege facts showing that defendant has not been guilty of laches. (*Ib.*)
- 12 (U. S. C. C., 1898). A national bank went into liquidation November 30, 1896. An action against a stockholder to enforce an assessment made by the Comptroller of the Currency was commenced November 9, 1897. Defendant's answer set up in detail the fraud by which he had been induced to subscribe and pay for stock, alleged that he had ever since been a resident of a distant State, and that, until a short time before the filing of the complaint, he had no opportunity of discovering the fraud. *Held*, that diligence was not shown. (*Ib.*)
- 13 (U. S. C. C., 1900). In exceptional cases, where there is no ground for an inference that credit was extended to a national bank on the faith of the ownership of stock by a defendant, he should be permitted to rescind his agreement of subscription after insolvency of the bank, where it was induced by fraud, as well when there are creditors as when there are none. There should be no presumption of law to overcome the fact capable of proof in such a case. (*Stufbeam v. De Lashmutt*, 101 Fed. Rep., 367.)
- 14 (S. Dak., 1894). One who has been induced to purchase bank stock by deceit of president as to bank's condition does not forfeit his right to rescind by the fact that he was shortly afterwards elected cashier, and did not, during his services as such, attempt rescission, if he had no knowledge of the condition of the bank. (*National Bank of Dakota v. Taylor*, 58 N. W., 297; 5 S. Dak., 99.)

## SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS—Continued.

## RIGHTS OF SHAREHOLDERS IN GENERAL—continued.

*State laws affecting shareholders.*

- 15 (U. S. Sup. Ct., 1876). A State statute required, under a penalty for his neglect or refusal, the cashier of each national bank within the State to transmit annually to the clerks of the several towns in which any stock or share holder should reside a true list of the names of such stock or share holders on the books of such banking association, together with the amount of money actually paid in on each share. *Held*, that the statute was valid. (*Waite v. Dowley*, 94 U. S., 527; 1 N. B. C., 137.)

## RIGHT TO VOTE AT MEETING OF SHAREHOLDERS.

- 1 (U. S. C. C., 1888). The provision of section 2144, Revised Statutes, which disqualifies shareholders "whose liability is past due and unpaid" from voting at meetings of shareholders, applies only to liability for unpaid subscriptions for stock. (*United States ex rel. v. Barry*, 36 Fed. Rep., 246.)
- 2 (U. S. C. C. A., 1898). A stockholder who, by power of attorney, has authorized another to vote his stock at any and all stockholders' meetings "In the same manner as I should do were I there personally present," is estopped by the vote of his proxy as respects any irregularity in the proceedings or calls of the meeting, which he could have waived if personally present. (79 Fed. Rep., 558, reversed; *Columbia National Bank of Tacoma et al. v. Matthews*, 85 Fed. Rep., 934.)
- 3 (Mass. Sup., 1889). Under the act of Congress, July 12, 1882, extending for the purpose of liquidation the franchises of such national banking associations as do not extend the periods of their charters and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation. But after the expiration of the term of its charter the stock of such an association is not transferable so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder, is ineligible as a director under Revised Statutes, section 5145. (*Richards v. Attleboro National Bank*, 148 Mass., 187; 3 N. B. C., 495.)

## TRANSFER OF STOCK.

## RIGHT OF HOLDER TO TRANSFER.

- 1 (U. S. Sup. Ct., 1870). The act of 1864 relieves the holder of bank shares from the restrictions imposed by section 36 of the act of 1863 against transferring his shares so long as he was indebted to the bank. (*First National Bank of South Bend v. Lanier*, 78 U. S.; 11 Wall., 369.)
- 2 (U. S. Sup. Ct., 1880). A shareholder in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a bona fide and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same and of assuming the transferrer's liabilities in respect thereto; and this right is not in such cases subject to the control of the directors or other stockholders. (*Johnston v. Laffin*, 103 U. S., 800.)
- 3 (Ind.). Stock in a national bank is transferable only on the bank's books and by no other person than the shareholder, except on proof of authority so to do. (*Weyer v. Second Nat. Bank*, 57 Ind., 198; *Koons v. Bank*, 89 Ind., 178.)
- 4 (Ind.). Mandamus may issue to compel officers of a national bank to permit the transfer of stock on the books of the bank when such officers refuse to make proper transfers. (*State v. First Nat. Bank*, 89 Ind., 302.)

## SHAREHOLDERS—Continued.

## TRANSFER OF STOCK—Continued.

## RIGHT OF HOLDER TO TRANSFER—continued.

*State can not limit transferable quality of stock.*

- 5 (N. Dak., 1892). It is not competent for State legislation to limit or interfere with the transferable quality of national-bank stock, as the same is left by the statutes of the United States. (*Doty v. First National Bank of Larimore*, 53 N. W., 77; 3 N. Dak., 9.)

*Purpose of entry of transfer in bank's books.*

- 6 (U. S. Sup. Ct., 1880). The entry of the transaction in the books of the association is required, not for the translation of the title, but for the protection of the parties and others dealing with the association, and to enable it to know who are its stockholders. (*Johnston v. Laffin*, 103 U. S., 800.)
- 7 (Ill. Sup., 1872). Shares in national banks are in the nature of choses in action. They are mere demands for dividends as they become due. The certificates of stock are merely evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member. The bank is the trustee of the stockholders, who must come to its counter for their dividends and their share of assets on final liquidation, and no transfer of stock can be completed until shown upon the books of the bank. (*First National Bank of Mendota v. Smith*, 65 Illinois, 44; 1 N. B. C., 390.)

*Rules governing transfer.*

- 8 (U. S. Sup. Ct., 1880). The transfer of shares in national banking associations is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. (*Johnston v. Laffin*, 103 U. S., 800.)
- 9 (U. S. Sup. Ct., 1880). Under the pretense of prescribing the manner thereof, an association can not clog the transfer with useless restrictions, or make it dependent on the consent of the directors or other stockholders. (Ib.)
- 10 (U. S. C. C., 1883). The rules which regulate the transfer of the stock of national banks are to be found in the statutes of the United States. The national banking act prescribes no exclusive method of transfer, but authorizes every association to do so. The decisions of the courts of the State in which the bank may be located do not control it. (*Scott et al. v. Pequonnock National Bank*, 15 Fed. Rep., 494.)

*Duty of corporation officers to see that a transfer of shares of stock is properly made, either by owner himself or by a person having authority from him.*

- 11 (U. S. Sup. Ct., 1878). The officers of a corporation are the custodians of its books, and it is their duty to see that a transfer of shares of its capital stock is properly made, either by the owner himself or by a person having authority from him. In either case they must act upon their own responsibility. Accordingly, when the name of the owner of a certificate of stock had been forged to a blank form of transfer, and to a power of attorney indorsed on it, and the purchaser of the certificate in this form, using the forged power of attorney, obtained a transfer of the stock on the books of the corporation. *Held*, in a suit by such owner against the corporation, that he was entitled to a decree compelling it to replace the stock on its books in his name, issue a proper certificate to him, and pay him the dividends received on the stock after its unauthorized transfer, or to an alternative decree for the value of the stock, with the amount of the dividends. (*Western Union Telegraph Co. v. Davenport*, 97 U. S., 369.)
- 12 (U. S. Sup. Ct., 1878). The negligence of their guardian can not preclude minors from asserting, by suit, their right to stock belonging to them which was so sold and transferred. If competent to transfer



## SHAREHOLDERS—Continued.

## TRANSFER OF STOCK—Continued.

## RIGHT OF HOLDER TO TRANSFER—continued.

it or to approve of the transfer made they must, to create an estoppel against them, have, by some act or declaration by which the corporation was misled, authorized the use of their names or subsequently approved such use by accepting the purchase money with knowledge of the transfer; but under the statute of Ohio, where the minors who are the complainants herein resided, they were not, nor without the authority of the probate court was their guardian, competent to authorize a sale of their property. (Ib.)

## WHEN SALE COMPLETE.

*When sale is complete and title passes.*

- 1 (U. S. Sup. Ct., 1880). When a shareholder, acting in good faith, delivers his certificates of stock, with a blank power of attorney for making the transfer, and receives the purchase money, the sale is complete and the title passes. (*Johnston v. Laffin*, 103 U. S., 800.)
- 2 (U. S. Sup. Ct., 1880). Title to stock passes on delivery of certificates to purchaser with authority to have shares transferred on books of bank. (Ib.)
- 3 (U. S. C. C., 1887). Defendant, being indebted to the bank of which he was cashier, transferred to it on the books of another bank the stock which he held in the latter, but did not deposit the certificates for such stock in his own bank and take up his paper held by it until some time later. *Held*, that the title of defendant's bank to the stock transferred dated from the deposit of the certificates with it and not from the transfer on the books of the other bank. (*Witters v. Sowles's Assignees et al.*, 32 Fed. Rep., 762.)

*Transferrer liable until transfer noted on books.*

- 4 (U. S. C. C., 1904). Defendant, prior to the failure of a national bank in which his son was a director, owned certain shares of the bank's stock, which he sold to his son, receiving in payment a demand note, secured by certain collateral. At the time of the sale the son promised that he would see that the shares were properly transferred, but he failed to do so. Defendant made no attempt to see that the stock was transferred, and it stood in his name on the books of the bank at the time of its failure. *Held*, that the son was prima facie the father's agent to transfer the shares, and that in the absence of proof that the transfer was in good faith, and of a prompt attempt to have the stock transferred on the books of the bank, the father was liable to assessment thereon. (*Schofield v. Twining*, 127 Fed. Rep., 486.)
- 5 (U. S. C. C., 1877). A shareholder who disposes of his stock will continue to be liable thereon until the transfer is noted on the books of the association. (*Bowdell v. Farmers and Merchants' National Bank of Baltimore*, 2 N. B. C., 146.)

*When purchaser of stock estopped to deny sale was real.*

- 6 (U. S. C. C., 1885). The sale by the president of a national bank, to himself and the cashier, of the stock of the bank owned by the bank may be ratified by the bank or its legal representative; but a sale by himself to the bank of its own stock, where he acts in the double capacity of seller and buyer, can not be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. In the one case the sale of the stock is enjoined by law, and its sale by the president may be ratified, however irregular it may have been in the first instance; but the purchase of its own stock by the bank is interdicted by law, and for this act there can be no authorization in advance and no ratification afterwards. (*Bundy v. Jackson*, 24 Fed. Rep., 628.)

## SHAREHOLDERS—Continued.

## TRANSFER OF STOCK—Continued.

## WHEN SALE COMPLETE—continued.

*When bank must recognize transfer by foreign executor.*

- 7 (U. S. C. C., 1880). In the absence of any provision in the by-laws or articles of association of a national bank to the contrary, such a bank is bound under the laws of Pennsylvania to recognize a transfer of its stock by a foreign executor duly appointed in another State. (Hobbs v. Western National Bank, 8 Weekly Notes of Cases, 131; 2 N. B. C., 187.)

## WHEN UNRECORDED TRANSFER PREVAILS OVER ATTACHMENT AGAINST VENDOR.

- 1 (U. S. C. C., 1883). Precedence should be given to unrecorded transfers of shares of stock of a national bank which had passed no by-law on the subject, located in a State whose courts leaned strongly against such transfers, but whose statutes gave the attaching creditors no peculiar rights, by delivery of certificates and a written assignment with power to transfer, both executed in blank, over subsequent attachment of a creditor of the original vendor in whose name the shares still stood on the books of the bank. (Scott et al. v. Pequonock National Bank, 15 Fed. Rep., 494.)
- 2 (U. S. C. C., 1883). Where no specified acts are by positive requirement made prerequisite to the vesting of a valid new title, creditors without notice take their debtor's property subject to all bona fide liens and equitable transfers. No registry being required, nonrecording was not evidence of fraud. The tendency is to regard State certificates, attached to an executed blank assignment and power to transfer, as approximating to negotiable securities and to favor attaching creditors less than when attachment and sale on execution alone could compel payment of a claim out of debtor's property. Federal courts have so decided. (Ib.)
- 3 (U. S. C. C., 1883). The courts of Connecticut and Massachusetts have quite rigidly maintained that where a statute or charter prescribes an exclusive manner of transfer of the stock of a corporation, an unrecorded transfer shall not be valid against the attaching creditors of vendor; and the courts of the former have strongly leaned toward a construction of the charters of its corporations compelling record of such transfers. (Ib.)
- 4 (U. S. C. C., 1886). On December 30, 1875, A sold certain shares of bank stock to B, and assigned them by transfer written on the back of the certificate. By the by-laws of the bank, stock was transferable only on the books of the company. On December 14, 1878, the shares were attached by a judgment creditor of A and sold and transferred to C. Neither the bank nor the creditor had knowledge of the transfer to B. In January, 1880, B presented his certificate and transfer to the officers of the bank and demanded a transfer of the stock, which was refused, whereupon he brought suit against the bank for such refusal. *Held*, that the bank was liable in damages for the refusal to transfer the shares. (Hazard v. National Exchange Bank of Newport, 26 Fed. Rep., 94.)
- 5 (Minn., 1887). An attachment of the shares by the bank, after notice of the assignment, is ineffectual to defeat the prior right of the assignee. (Nicollet National Bank of Minneapolis v. City Bank, 35 N. W. Rep., 577; 38 Minn., 85.)
- 6 (N. Dak., 1892). Revised Statutes United States, section 5139, providing that the stock of a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association," is for the benefit of the corporation, its shareholders and creditors, only; and the rights of a transferee of national-bank stock, under an unrecorded transfer, good at common law, are superior to the rights of a subsequent attaching creditor of the transferer without notice. (Doty v. First National Bank of Larimore, 53 N. W., 77; 3 N. Dak., 9.)

## SHAREHOLDERS—Continued.

## TRANSFER OF STOCK—Continued.

## EFFECT OF ASSIGNMENT WITHOUT TRANSFER ON BOOKS.

- 1 (Minn., 1887). Though the shares of stock in defendant bank were made transferable only on the books of the bank, an assignment without such transfer invested the assignee with an equitable title, which would be protected as against all persons not showing a superior right. (*Nicollet National Bank of Minneapolis v. City Bank*, 35 N. W. Rep., 577; 38 Minn., 85.)
- 2 (Minn., 1887). An assignment of stock transferable only on the books, without such transfer, for the purpose of collateral security, is effectual as against the bank asserting a lien for the debt of the stockholder (contrary to the Minnesota statute of 1881); and its refusal, because of such asserted lien, to make the proper transfer on its books renders it liable to the assignee as for conversion of the stock. (Ib.)

## BANK'S LIABILITY FOR REFUSAL TO TRANSFER.

- 1 (U. S. Sup. Ct., 1879). B., having duly sold stock of a national bank of Louisiana pledged to him by A., applied to the cashier to have it transferred on the bank books, but the cashier refused, on the ground that A was indebted to the bank. The bank having failed before the transfer could be enforced, B. brought an action of damages against the receiver. *Held*, (1) that the action was not barred by the statute of limitations of one year; (2) the cashier having been intrusted by the directors with the duty of transferring the stock of the bank, his refusal was imputable to the bank; (3) the court below had power, to order the receiver to pay the claim or certify it to the Comptroller. (*Case, Receiver, v. Citizens' Bank of Louisiana*, 100 U. S., 446; 2 N. B. C., 47.)
- 2 (U. S. Sup. Ct., 1879). Bank cashier refusing to transfer, on books of bank, shares of capital stock pledged and sold for debt of one of its stockholders, receiver of bank is liable for value of stock at that time if bank had no lien thereon to justify such refusal. (Ib.)

## MISCELLANEOUS PROVISIONS RELATING TO TRANSFER OF STOCK.

*Vendee of stock liable for unpaid subscription.*

- 1 (U. S. C. C. A., 1896). One who takes an assignment of stock, accompanied by a transfer to his name on the books, and receives a certificate from the corporation, issued to him in his own name, reciting that he is entitled to so many shares, on each of which a certain sum has been paid, leaving a specified amount "to be paid when called for," is liable as a subscriber for the balance due on the stock. (*Glen v. Porter*, 73 Fed. Rep., 275.)

*Bank's purchase and transfer to its directors of its own stock void.*

- 2 (U. S. Dist. Ct., 1878). Where a national banking association purchases shares of its own stock and divides them among its directors, to whom the shares are transferred upon the stock books, the transaction is void, and no title passes. (*Meyers v. Valley National Bank*, 13 National Bankruptcy Register, 34; 2 N. B. C., 156.)

*After end of term of charter transfers prohibited.*

- 3 (Mass. Sup., 1889). Under the act of Congress July 12, 1882, extending for the purpose of liquidation the franchises of such national banking associations as do not extend the periods of their charters and making applicable to them the statute relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting liquidation. But after the expiration of the term of its charter the stock of such an association is not transferable so as to give the transferee the right to share in the election of directors, and such transferee, not being a stockholder,

## SHAREHOLDERS—Continued.

## TRANSFER OF STOCK—Continued.

## MISCELLANEOUS PROVISIONS RELATING TO TRANSFER OF STOCK—continued.

is ineligible as a director under Revised Statutes, section 5145. (*Richards v. Attleboro National Bank*, 148 Mass., 187; 3 N. B. C., 495.)

*When transfer of certificate waives right to dividends.*

- 4 (N. C., 1894). Where one to whom the dividends on certain stock were bequeathed during her life or widowhood, after which the stock was to go to her daughter, consented to the transfer of the certificate of the stock to her daughter, she waived all claim to the dividends thereon. (*Kennedy v. First National Bank of Wilson*, 20 S. E., 375; 115 N. C., 223.)

*When specific performance of contracts to sell denied.*

- 5 (Pa. Sup., 1879). In an equitable action to enforce specific performance of an agreement to sell shares in a national bank, which the purchaser wished to obtain for the purpose of securing control of the bank, held, that specific performance would not be decreed (1) because, generally, equity will not enforce specific execution of a contract relating to personal chattels, and (2) because a decree enforcing the agreement in question would be against public policy. (*Foll's Appeal*, 21 Alb. L. J., 27; 2 N. B. C., 411; 91 Pa., 434.)

## LIABILITIES OF SHAREHOLDERS.

## LIABILITY WHEN MONEY BORROWED BY ORDER OF SHAREHOLDERS.

- 1 (N. C. Sup., 1900). Where stockholders of an insolvent national bank authorize the trustee of the bank to borrow money on their credit to pay the bank's liabilities, and agree to repay the deficiency between the sum borrowed and the sum realized from the bank's assets, the bank, its assets having been exhausted, and trustee are not necessary parties to an action to recover the money so loaned. (*Hanover Nat. Bank v. Cocke et al.*, 37 S. E. Rep., 507; 3 Banking Cases, 249.)
- 2 (N. C. Sup., 1900). Where a guardian who holds stock for his ward in an insolvent national bank enters into an agreement with the other stockholders authorizing the trustee of the bank to borrow money on their credit to pay its liabilities for the purpose of avoiding unnecessary expense, the agreement is binding upon the ward. (Ib.)

## LIABILITY OF SHAREHOLDERS OF NATIONAL BANK WHOSE ASSETS HAVE BEEN TRANSFERRED TO ANOTHER BANK.

- 1 (U. S. C. C. A., 1904). Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which the stockholders were liable, as provided by Rev. Stat. 5151. (*George et al. v. Wallace, Brownlee et al. v. Same, Morsman v. Same, Poppleten v. Same, Morton et al. v. Same, McCague Inv. Co. et al. v. Same*, 135 Fed. Rep., 286.)

## ASSESSMENTS.

## NATURE AND EXTENT OF LIABILITY FOR ASSESSMENT.

*Liability statutory.*

1. The personal liability of a stockholder in a national banking association is statutory.  
(U. S. Sup. Ct., 1869) *Kennedy v. Gibson*, 75 U. S., 498;  
(U. S. C. C. A., 1898) *Scott v. Latimer*, 89 Fed. Rep., 843;  
(Mich. Sup., 1889) *Foster v. Broas* (*Foster v. Row*), 79 N. W., 696;  
120 Mich., 1; 2 Banking Cases, 700, and note at end of case.

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## NATURE AND EXTENT OF LIABILITY FOR ASSESSMENT—continued.

- 2 (U. S. C. C., 1899). The liability of a stockholder in a national bank, who has made full payment for his stock, to pay assessments for the benefit of the bank's creditors is not contractual, but is a conditional liability, imposed by law as an incident to ownership of the stock. (*Aldrich v. Skinner*, 98 Fed. Rep., 375.)
- 3 (U. S. C. C. A., 1901). The statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it. The liability of the shareholders of national banks for their debts under section 5151 of the Revised Statutes is based upon contract. (*Deweese v. Smith et al.*, 106 Fed. Rep., 438.)

*Liability several, how fixed.*

4. The liability of a stockholder of a national bank is several, and is fixed by his taking stock in the corporation.  
(U. S. Sup. Ct., 1869) *Kennedy v. Gibson*, 75 U. S., 498;  
(U. S. C. C.) *Bailey v. Sawyer*, 4 Dill, 463.
- 5 (U. S. C. C., 1891). A person who becomes a stockholder in a national bank thereby submits himself to the provisions of the national-bank act and becomes liable to be assessed to the extent of his statutory liability for all debts of the bank existing while he holds his stock. (*Young v. Wempe et al.*, 46 Fed. Rep., 354.)

*Liability proportionate to shares owned.*

- 6 (U. S. Sup. Ct., 1880). The amount contributed by each shareholder should bear the same proportion to the whole amount of the deficit as his own stock bears to the whole amount of the capital stock at its par value. And the solvent shareholders can not be made to contribute more than their proportion to make good the deficiency caused by the insolvency of other shareholders. (*United States v. Knox*, 102 U. S., 422.)

*Individual liability of the stockholders restricted to contracts, debts, and engagements contracted in ordinary course of business.*

- 7 (U. S. Sup. Ct., 1887). The individual liability of the stockholders must be restricted in its meaning to such contracts, debts, and engagements of the association as have been duly contracted in the ordinary course of its business. And, therefore, creditors of an association who make settlements *after the association is put into liquidation* and receive from the president payment of their claims in paper of the association, or of the individual notes of the president himself, indorsed or guaranteed in the name of the association, are not to be considered as creditors of the association entitled to subject the stockholders to individual liability, for these are new contracts. (*Richmond v. Irons*, 121 U. S., 27.)

*When stockholders can not be charged with expenses of receivership.*

- 8 (U. S. Sup. Ct., 1887). On a bill to enforce the individual liability of the stockholders of a national bank in voluntary liquidation they can not be charged with the expenses of the receivership. (*Ib.*)

*When whole amount of assessment may be collected from one of the owners of undivided stock.*

- 9 (U. S. Sup. Ct., 1900). Although the whole amount of an assessment on shares of national-bank stock is enforced, pursuant to a State statute, against one to whom there has been an allotment of national-bank stock in indivision, to the extent of the distributive share of the estate received by him, he is not entitled to complain, under the Federal statute providing that each shareholder in a national bank can only be liable to the extent of the amount of his stock therein. (*Matteson et al. v. Dent, Receiver*, 2 Banking Cases, 469; 176 U. S., 521.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## NATURE AND EXTENT OF LIABILITY FOR ASSESSMENT—continued.

*Liability that of principal, not surety.*

- 10 (U. S. C. C., 1881). The liability which shareholders in national banks incur under section 12 of the act of 1864, which provides for a liability "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares," is that of principals, not of sureties. (Hobart, Receiver, etc., v. Johnson, 8 Fed. Rep., 493.)

*Liability not that of guaranty.*

- 11 (U. S. C. C., 1881). Such a liability is not one on a "promise to pay the debt, or answer for the default or liability, of any other person," within the meaning of the provision to section 5 of the Revised Statutes of New Jersey of 1874, page 469. (Hobart, Receiver, etc., v. Johnson, 8 Fed. Rep., 493.)
- 12 (U. S. C. C., 1900). Under the national banking act (Rev. Stat., sec. 5151), requiring that the shareholders of every national bank shall be held individually responsible, equally and ratably, and not one for another, for all debts of the bank, to the extent of the amount of their stock, at the par value thereof, in addition to the amount invested in such stock, a stockholder can not be required to make good the failure of another stockholder to pay his assessment; and, where an assessment has been made, it must be considered, for the purpose of making a second assessment, as if the entire assessment had been paid. (Lease v. Barschall et al., 106 Fed. Rep., 762.)

*Assessment may be to pay any liability of bank.*

- 13 (U. S. Dist. Ct.). The individual liability of the shareholders of an insolvent association may be enforced for the purpose of paying all of its liabilities, and not merely for the purpose of paying its "debts," technically so called. (Stanton v. Wilkeson, 8 Ben., 357.)

*Stockholders may dispute validity of debts to pay which assessment is made.*

- 14 (U. S. C. C., 1901). The fact of an assessment by the Comptroller upon the stockholders of a national bank does not conclude such stockholders as to the validity of the debts to pay which the assessment is made, and they are entitled to their day in court upon that question before being required to pay the assessment in an action against them by the receiver. Where the defendants in such an action assert the invalidity of a judgment against the bank which is the basis of the assessment, the appropriate procedure would seem to be for them to file a bill in equity to determine the validity of such judgment, and to enjoin the action against them, giving bond for the payment of the judgment therein in case the injunction should be dissolved after hearing. (Moss v. Whitzel, 108 Fed. Rep., 579.)

*Recovery of assessment paid under mistake of fact, parties.*

- 15 (U. S. C. C., 1897). The Comptroller of the Currency and the Treasurer of the United States are not necessary parties defendant in an action against the receiver of an insolvent national bank to recover an assessment made by the Comptroller, and paid by the plaintiff under the erroneous belief that he was a stockholder. (Brown v. Tillinghast, 84 Fed. Rep., 71.)

*Invalid assessments considered on final distribution.*

- 16 (U. S. C. C., 1899). Shareholders in a national bank who, in good faith, paid an invalid assessment on their stock, on the subsequent winding up of the affairs of a bank by a receiver, and the payment of outside creditors, are entitled, as against the other shareholders, to repayment of the amount so paid before a general distribution of the remaining assets. (In re Hulitt, 96 Fed. Rep., 785.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## CONCLUSIVENESS OF COMPTROLLER'S ACTION.

*What sufficient.*

- 1 (U. S. Sup. Ct., 1882). A letter addressed to the receiver, and signed by the Comptroller of the Currency, directing him to institute legal proceedings to enforce the individual liability of every stockholder, under the statute, is sufficient evidence that the Comptroller decided, before the suit, that it was necessary to enforce the personal liability of the stockholders. (Bowden v. Johnson, 107 U. S., 251; 3 N. B. C., 55.)
- 2 (U. S. Dist. Ct., 1900). The original order of the Comptroller of the Currency levying an assessment on the shares of a national bank, over his official signature and seal, proves itself, and fixes the liability of the shareholders from its date, no demand being necessary. (Brown v. Ellis, 103 Fed. Rep., 834.)

*Conclusive as to amount.*

3. Where a national banking association is insolvent, order of Comptroller of Currency declaring to what extent the individual liability of stockholders shall be enforced is conclusive.
  - (U. S. Sup. Ct., 1869) Kennedy v. Gibson, 75 U. S. (8 Wall.), 498;
  - (U. S. Sup. Ct., 1876) Casey v. Galli, 94 U. S., 673;
  - (U. S. Sup. Ct., 1878) Germania National Bank v. Case, 99 U. S., 628;
  - (U. S. C. C. A., 1901) Deweese v. Smith, 106 Fed. Rep., 438;
  - (U. S. C. C. A., 1899) Aldrich v. Campbell, 2 B. C., 481; 97 Fed. Rep., 663;
  - (U. S. C. C.) Bailey v. Sawyer, 4 Dillon, 463;
  - (U. S. C. C., 1891) Young v. Wempe et al., 46 Fed. Rep., 354;
  - (Cal.) O'Connor v. Witherby, 111 Cal., 523.

*Conclusive as to necessity for.*

4. The question whether there is a deficiency of assets, and when it is necessary to enforce the individual liability of shareholders, is for the Comptroller to determine; and his decision in this matter is final and conclusive.
  - (U. S. Sup. Ct., 1869) Kennedy v. Gibson, 8 Wall., 498;
  - (U. S. Sup. Ct., 1878) Germania National Bank v. Case, 99 U. S., 628;
  - (U. S. Sup. Ct., 1876) Casey v. Galli, 94 U. S., 673;
  - (U. S. Dist. Ct.) Strong v. Southworth, 8 Ben., 331;
  - (U. S. C. C.) Bailey v. Sawyer, 4 Dill., 463.
- 5 (U. S. Sup. Ct., 1897). It has been repeatedly settled by this court that the Comptroller of the Currency has power to appoint a receiver of a defaulting or insolvent national bank, and to call for a ratable assessment upon the stockholders of such bank without a previous judicial ascertainment of the necessity for such action. (Bushnell v. Leland, 164 U. S., 684.)
6. The action of the Comptroller in ordering an assessment against the stockholders of an insolvent national bank is conclusive on the stockholders of the necessity for such assessment, which can not be questioned by them, either at law or in equity.
  - (U. S. Sup. Ct., 1869) Kennedy v. Gibson, 75 U. S. (8 Wall.), 498;
  - (U. S. Sup. Ct., 1876) Casey v. Galli, 94 U. S., 673;
  - (U. S. Sup. Ct., 1878) Germania National Bank v. Case, 99 U. S., 628;
  - (U. S. C. C. A., 1899) Aldrich v. Campbell, 97 Fed. Rep., 663;
  - (U. S. C. C., 1899) Aldrich v. Yates, 95 Fed. Rep., 78;
  - (U. S. C. C., 1895) Nead v. Wall, 70 Fed. Rep., 806;
  - (U. S. C. C., 1889) Welles v. Stout, 38 Fed. Rep., 67.
- 7 (U. S. C. C. A., 1901). The action of Comptroller of the Currency in making an assessment against the stockholders of an insolvent national bank is conclusive as to the necessity of such assessment,

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## CONCLUSIVENESS OF COMPTROLLER'S ACTION—continued.

which can not be questioned collaterally, and is open to avoidance by a court only in a direct attack upon it for error of law, fraud, or mistake. (*Deweese v. Smith*, 106 Fed. Rep., 438.)

## RIGHT OF COMPTROLLER TO MAKE SUCCESSIVE ASSESSMENTS.

- 1 (U. S. Sup. Ct., 1902). The Comptroller of the Currency is authorized to make a second assessment upon the shareholders of an insolvent national-bank association where the first assessment proves insufficient to pay the debts and liabilities of the bank, by United States Revised Statutes, section 5234, empowering him, if necessary to pay the debts of such association, to enforce the individual liability of its shareholders, which, by section 5151, is measured by the par value of their stock in addition to the amount invested therein, so long as both assessments do not exceed that amount. (*Studebaker v. Perry*, Receiver, etc., 22 Sup. Ct. Rep., 463; 184 U. S., 258.)
- 2 (U. S. C. C. A., 1901). The statutes and the settled law of the land at the time a contract is made becomes a part of it, and must be read into it. (*Deweese v. Smith et al.*, 106 Fed. Rep., 438.)
- 3 (U. S. C. C. A., 1901). The liability of the shareholders of national banks for their debts under section 5151 of the Revised Statutes is based upon contract. (Ib.)
- 4 (U. S. C. C. A., 1901). The contract of the shareholder of a national bank with the bank and its creditors regarding its debts is that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the Comptroller of the Currency shall demand, the debts and obligations of his bank. (Ib.)
- 5 (U. S. C. C. A., 1901). A judgment for a part of an entire, indivisible demand, all of which is due when the action is commenced, is an election to take the part in satisfaction of the whole, and it estops the plaintiff from recovering the residue. (Ib.)
- 6 (U. S. C. C. A., 1901). But a judgment for a part of such a demand which is due does not estop the plaintiff from maintaining another action for another part of the demand which becomes due subsequent to the commencement of the first action. (Ib.)
- 7 (U. S. C. C. A., 1901). A judgment in favor of the receiver of an insolvent national bank for the recovery of an assessment made by the Comptroller upon a shareholder does not estop him from maintaining a second action against the same shareholder for another assessment which had not been made or was not due when the first action was commenced. (Ib.)
- 8 (U. S. C. C. A., 1901). While the construction of statutes by the officers to whom Congress has intrusted their execution and the uniform practice of such officers are persuasive and entitled to careful consideration, yet a court can not lawfully renounce its judicial powers; and it is its duty, if satisfied upon reason or authority that a correct determination of the question before it requires a decision contrary to such construction and practice, to render that decision. (Ib.)
- 9 (U. S. C. C. A., 1901). The decision of the Comptroller of the Currency that it is necessary to collect, and his requisition of a certain percentage of the liability of the shareholders of a national bank, in order to pay its debts is not a decision that a larger percentage will not be necessary, and he has plenary power to make successive assessments until the full liability of the shareholder is exhausted. (Ib.)
- 10 (U. S. C. C. A., 1901). The statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of the liability of the share-



## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## RIGHT OF COMPTROLLER TO MAKE SUCCESSIVE ASSESSMENTS—continued.

holder of a national bank to pay its debts until the time when the Comptroller has declared the entire liability or the particular portion of it in issue to be due. (Ib.)

- 11 (U. S. C. C. A., 1901). Under the acts of Congress the Comptroller of the Currency is constituted a quasi judicial tribunal to determine at what times and what amounts, not exceeding the full liability of the stockholders, it is necessary to collect from them to pay the debts of the bank. His decisions of these questions are impervious to collateral attack and open to avoidance by a court only in a direct attack upon them for error of law, fraud, or mistake. (Ib.)
- 12 (U. S. C. C. A., 1901). One who would attack in a Federal court the decision of a quasi judicial officer for mistake of fact must proceed in equity, and must allege and prove the evidence before the officer from which the mistake resulted, the way in which it was made, and the fact that in its absence his decision would have been otherwise, before a court can enter upon a reconsideration of the issue before the officer. (Ib.)
- 13 (U. S. C. C., 1899). The ultimate liability of a stockholder of an insolvent national bank, under the statute, is for the full amount of the par value of his stock, if that amount is required, and when the Comptroller makes an assessment for a smaller amount he has power to make a second assessment, if the first proves insufficient to pay the debt of the bank. (Aldrich v. Yates, 95 Fed. Rep., 78.)
- 14 (U. S. C. C., 1900). Under the national banking act (Rev. Stat., sec. 5151), requiring that the shareholders of every national bank shall be held individually responsible, equally and ratably, and not one for another, for all debts of the bank, to the extent of the amount of their stock, at the par value thereof, in addition to the amount invested in such stock, a stockholder can not be required to make good the failure of another stockholder to pay his assessment; and, where an assessment has been made, it must be considered, for the purpose of making a second assessment, as if the entire assessment had been paid. (Lease v. Barschall et al., 106 Fed. Rep., 762.)
- 15 (U. S. C. C., 1900). Where stockholders of a national bank have paid an assessment to a receiver of the bank, the receiver becomes the trustee of the creditors; and any loss he may sustain by investments, in endeavoring to save the debts of the bank, can not be charged to the shareholders and made the subject of an additional assessment. (Ib.)

*Assessment limited to amount needed.*

- 16 (U. S. Sup. Ct., 1880). Where, to discharge liabilities of an insolvent bank, Comptroller assessed against shareholders a sufficient per cent on par value of stock held by each, some being insolvent, he can not provide for deficiency by new assessment. (United States v. Knox, 102 U. S., 422.)

## WHO DEEMED TO BE SHAREHOLDERS FOR ASSESSMENT.

*One who appears on books as owner is chargeable with assessment.*

1. One who appears on the books of the association as the owner of shares of its stock is individually liable, though he hold the stock merely as collateral security.
  - (U. S. Sup. Ct., 1878) Germania National Bank v. Case, 99 U. S., 628;
  - (U. S. C. C., 1877) Bowdell v. Farmers and Merchants' National Bank of Baltimore, 2 N. B. C., 146;
  - (U. S. C. C.) Moore v. Jones, 3 Woods, 53;
  - (Ill.) Wheelock v. Kost, 77 Ill., 296;
  - (Iowa) Hale v. Walker, 31 Iowa, 344.

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## WHO DEEMED TO BE SHAREHOLDERS FOR ASSESSMENT—continued.

- 2 (U. S. Sup. Ct., 1900). As a general rule, the legal owner of stock in a national banking association—that is, the one in whose name stock stands, on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable for contributions in case of the insolvency of the bank. The exceptions to this general rule, so far as established by decisions of this court, are: (1) That where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded and the real owner be held liable; (2) that where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, those acts will operate a transfer on the books and extinguish the liability, as stockholder, of the transferrer; (3) where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name as pledgee, a registry did not amount to a transfer to the pledgee as owner. (*Matteson v. Dent*, 176 U. S. Rep., 521.)
- 3 (U. S. C. C., 1896). One who knowingly permits his name to be entered upon the stock books of a national bank as the owner, individually, of stock therein can not be permitted, as against creditors, or a receiver of the bank representing them, to show that he was not the owner of the stock; and he is liable for an assessment thereon, though he held the stock, in fact, as trustee for the bank itself. (*Lewis v. Switz*, C. C., 74 Fed. Rep., 381.)
- 4 (U. S. C. C., 1879). S. bought shares in a national bank and caused them to be transferred to E., who was in his employ, S. remaining the real owner. *Held*, that S. was liable as stockholder upon the failure of the bank. (*Davis, Receiver, v. Stevens*, 20 Alb. L. J., 490; 2 N. B. C., 158.)
- 5 (U. S. C. C., 1881). Under section 5151, Revised Statutes, owners of stock in a national bank are liable for its debts, and persons who hold themselves out or allow themselves to be held out as owners of stock are also liable, whether they own stock or not. (*Case, Receiver, v. Small et al.*, 10 Fed. Rep., 722.)
- 6 (U. S. C. C., 1886). When bank stock was sold, but not transferred on the books of the bank, and the bank afterwards failed, the executors of the person in whose name the stock stood on the books were held liable for assessment, although said stock had been paid for by a purchaser buying at the request of the president of the bank, who gave him a cashier's check for that purpose, placing the money so furnished to the credit of said purchaser on the books of the bank as a temporary loan, the intention being ultimately to transfer said shares to a third party as part of a larger proposed investment in stock, for which funds had been placed in the hands of the president of the bank. (*Price, Receiver, v. Whitney et al.*, 28 Fed. Rep., 297.)
- 7 (U. S. Dist. Ct., 1877). If the trusteeship of one who holds stock in trust does not appear upon the books of the association he will be individually liable. (*Davis v. Essex Baptist Society*, 44 Conn., 582; 2 N. B. C., 110.)
- 8 (N. Y. Appls., 1887). L. was president of the defendant national bank, and had substantial control and management. He bought fifty shares of defendant's outstanding stock and paid for it with the proceeds of a note signed by M., the cashier, which he indorsed and placed in the bank as discounted paper. He afterwards bought one hundred and forty-eight shares, and paid for them by an ordinary call loan from

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## WHO DEEMED TO BE SHAREHOLDERS FOR ASSESSMENT—continued.

- defendant. On subsequently selling a portion of the stock, L. applied the proceeds to the note and call loan. He did not assume to act for defendant, and the stock was transferred to him individually, and was in his name on the books. He had no actual authority to buy the stock for defendant, but the evidence tended to show that the purpose of the purchase was to get the stock into the hands of persons who would be useful to defendant. In an action for fraud in a subsequent sale of such stock by L., *held*, that defendant could not be charged as owner of the stock. (*Prosser v. First National Bank of Buffalo*, 106 N. Y., 677; 3 N. B. C., 646.)
- 9 (N. Y. Appls., 1887). On the question whether the president represented defendant to be the owner of the stock, plaintiff testified that in the conversation resulting in the sale the president stated that "we can sell you some of our stock at 160," and that that was "the price that the bank took it in at." Plaintiff did not inquire as to the ownership. The president testified that while he might have stated that "we have some stock," his best recollection was that he did not say "the bank took it in." No motive appeared for his representing defendant to be the owner. *Held*, that the evidence sustained a finding negating such representations. (Ib.)
- 10 (N. Y. Appls., 1887). An appeal from an order of reversal which does not state that the reversal was upon questions of fact brings up for review only questions of law. (Ib.)
- 11 (N. Y. Appls., 1887). A finding of fact by the trial court upon sufficient evidence, and not reversed by the general term, is conclusive on appeal to the court of appeals. (Ib.)

*Real owner liable for assessment.*

- 12 (U. S. Sup. Ct., 1887). A stockholder sold certain stock several months before the insolvency of the bank, but the transfer was not made on the books till the date of the bank's failure. *Held*, that there being no proof of the delivery of the stock to the bank indorsed for transfer, that the stockholder incurred the statutory liability. (*Richmond v. Irons*, 121 U. S., 27.)
- 13 (U. S. C. C.). The real owner of the stock is liable as a stockholder, though when he purchased the stock he had it transferred upon the books to another. (*Davis v. Stevens*, 17 Blatch., 259.)
- 14 (U. S. C. C. A., 1899). The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency, and the receiver may bring an action at law for the collection of such assessment directly against him, without regard to the liability of the agent. (*Houghton v. Hubbell*, 91 Fed. Rep., 453.)
- 15 (Ill. Sup., 1882). Where a national bank issues certificates of its shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-law in regard to a transfer on its books, so far as creditors of the bank are concerned, a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the national banking law. (*Laing v. Burley*, 101 Ill., 591; 3 N. B. C., 369.)

*Cashier presumed to know stock stood in his name on books, although certificate had not been issued him.*

- 16 (U. S. Sup. Ct., 1891). A director who is also vice-president and cashier of a national bank can not shield himself from liability as a stockholder and from what he had received from a dividend fraudulently declared by alleging ignorance of what appears by the books of which he has charge. (*Finn v. Brown*, 142 U. S., 56.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## WHO DEEMED TO BE SHAREHOLDERS FOR ASSESSMENT—continued.

- 17 (U. S. Sup. Ct., 1891). Where a person receives from a bank a dividend on stock which he denies owning, he should restore the dividend to the bank. He does not free himself from liability for it by giving his check on the bank for the amount to alleged true owner. (Ib.)

*Assignee of shareholder liable.*

- 18 (Colo. Sup., 1901). Under Revised Statutes United States, section 5151, making the shareholders of a national bank liable personally for the debts of the bank, an assignee for the benefit of creditors of a shareholder is bound to pay the assessment levied by the receiver of the bank after its insolvency, though it is levied after the assignment. (Graham v. Platt, 65 P., 30; 28 Colo., 421.)

## WHO NOT CHARGEABLE WITH ASSESSMENTS.

- 1 (U. S. C. C. A., 1895). Plaintiffs subscribed for certain shares of stock in the E. Bank, to be issued for the purpose of increasing its capital and changing it into a national bank, and paid certain installments on their subscription to the bank, to be held in trust until the whole subscription was paid and the shares legally issued. Subsequently they consented that the E. Bank should be consolidated with the F. National Bank, the capital of the latter increased from \$100,000 to \$200,000, and that their subscriptions should stand as subscriptions to such increase of the stock of the F. National Bank. They afterwards made some further payments on their subscriptions. Some preliminary steps were taken by the F. National Bank for the increase of its stock, but the Comptroller of the Currency refused to consent to an increase to more than \$150,000, and before that amount had been paid in and before any certificate had been made by the Comptroller declaring an increase the F. National Bank was declared insolvent and placed in the hands of a receiver. *Held*, that the plaintiffs had never become stockholders in the F. National Bank. (McFarlin et al. v. First Nat. Bank of Kansas City, Kans., et al., 68 Fed. Rep., 868.)
- 2 (U. S. Dist. Ct., 1901). Where, on an issue as to whether defendant was liable as a stockholder of an insolvent national bank, it appears from an agreed statement as to what the bank books and reports show that at the time the four shares in question, purported to have been transferred to him by the president, the latter's stock was all pledged, it must be held that defendant acquired no stock, and never in reality became a legal shareholder, and hence is not subject to a shareholder's liability. (Burt v. Richmond, 107 Fed. Rep., 387.)
- 3 (U. S. C. C. A., 1899). Title of C. to stock in a bank is divested, so as to relieve him of liability for an assessment levied four years thereafter, on the bank becoming insolvent, where he employed auctioneers to sell it, and put into their hands his stock certificate, having indorsed thereon an assignment in blank, and a power of attorney in blank to transfer the stock, duly executed by him, and they knocked down the stock to S., who was cashier of the bank, and took the certificate to the banking house, and delivered it to S., "as cashier" of the bank, and requested him to transfer the shares to the purchaser thereof; and this, notwithstanding a by-law of the bank that "no officer \* \* \* shall, without permission of the directors, hold stock in the bank"—the inference from the payment of semiannual dividends to S. for the four years being that the bank had accepted him as a stockholder. (Earle v. Coyle, 97 Fed. Rep., 410.)

## VALIDITY AND EFFECT OF TRANSFER.

*Right to transfer when bank is insolvent.*

- 1 (U. S. Sup. Ct., 1903). The presumption of liability of a stockholder of a national bank begotten by the presence of the name on the stock register may be rebutted if the jury finds the fact to be that a bona

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

fide sale of the stock had been made and every duty had been performed which the law imposed in order to secure a transfer on the registry of the bank. The mere reduction of the reserve of a national bank below the legal limit does not affect with a legal presumption of bad faith all transactions made with or concerning the bank during the period while the reserve is impaired. (*Earle v. Carson*, 188 U. S., p. 42.)

- 2 (U. S. Sup. Ct., 1903). The power of a stockholder to transfer stock in a national bank, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the facts and had sold the stock in order to avoid the impending double liability. (*Ib.*)
- 3 (U. S. Sup. Ct., 1903). Nor is such a bona fide sale void if the person to whom the stock is sold is, owing to his insolvency, unable to respond to the double liability, if the fact of such insolvency was, at the time of the sale, unknown to the seller. (*Ib.*)
- 4 (Mich. Sup., 1899). A stockholder has the right, even when the bank is insolvent, to make a bona fide sale of his own stock to any person, whether resident or nonresident, capable in law of taking and holding the same, and of assuming the liabilities of the transferrer under such statute in respect thereto. (*Foster v. Broas et al.*, *Foster v. Row*, 2 Banking Cases, 700; 120 Mich., 1; 79 N. W., 696.)
- 5 (Mich. Sup., 1899). The mere fact that a transfer of stock is not registered on the books of the bank will not prevent it from relieving the transferrer from liability under such statute. (*Ib.*)
- 6 (Mich. Sup., 1899). Although the bank is insolvent, a stockholder having no knowledge of such fact may relieve himself from liability under such statute by making a bona fide transfer by gift to his son, although the latter is insolvent at the time of the transfer. (*Ib.*)

*When transferrer's liability ceases.*

- 7 (U. S. Sup. Ct., 1886). Where a shareholder who has sold his stock has delivered to the bank the certificate of stock and a power of attorney, with the request that the transfer be made upon the books of the bank, and has had no reason to suppose that such transfer was not made, he will not, should the bank afterwards become insolvent, be held liable as a shareholder, although he still appears as such on the books of the bank. (*Whitney v. Butler*, 118 U. S., 655.)
- 8 (U. S. Sup. Ct., 1887). But where the president of the bank is himself the purchaser of the stock, then the delivery of the certificates and power of attorney to him, with the request to make the transfer upon the books of the bank, would not be sufficient to discharge the seller from liability as a stockholder. (*Richmond v. Irons*, 121 U. S., 27.)
- 9 (U. S. C. C. A., 1901). An owner of shares in a national bank who sold the same in good faith, without knowledge or reason to believe that the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, can not be treated as a shareholder and held liable to an assessment made by the Comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify it where the seller has exercised due diligence and has acted in the transaction in fairness and good faith. (*Earle v. Carson*, 107 Fed. Rep., 639; affirmed by U. S. Sup. Ct., 188 U. S., 42.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

- 10 (U. S. C. C., 1889). Where a shareholder of a national bank makes a bona fide sale of his stock and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the Comptroller of the Currency, under Revised Statutes, section 5151, to pay the bank's debts. (*Hayes v. Shoemaker*, 39 Fed. Rep., 319.)
- 11 (U. S. C. C., 1892). In an action by the receiver of a national bank to enforce an assessment under Revised Statutes, section 5151, against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal; that he indorsed the same, and requested the broker to inform the cashier of the transaction and to have the stock transferred; that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate." *Held*, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder. (*Whitney v. Butler*, 118 U. S., 655, followed *Richmond v. Irons*, 121 U. S., 27, distinguished; *Young v. McKay*, 50 Fed. Rep., 394.)
- 12 (Mich. Sup., 1899). E., when a stockholder in a solvent bank, and when he was liable to it for an overdraft, sold his stock to its cashier, who purchased it for himself, and delivered the stock certificate properly signed to the latter, who had control of the stock register. E. received as payment for the stock a credit on his pass book to the amount of the overdraft, authorized by the cashier; but when the bank closed its doors E. was a registered stockholder, as appeared by the books of the bank, and the overdraft appeared thereon unpaid. *Held*, that such transfer discharged E. from liability as a stockholder, as much so as if the cashier had paid the purchase money from his own pocket and had registered the transfer. (*Foster v. Broas et al.* (*Foster v. Row*), 2 Banking Cases, 700; 120 Mich., 1; 79 N. W., 696.)
- 13 (Tenn. Sup., 1896). Defendant, who was the owner of stock in a national bank which, under its by-laws, was transferable only on the books of the bank, sold the same, and after executing a written assignment to the purchaser and a power of attorney in blank to make the transfer, indorsed on her certificate of stock, delivered the certificate to the president of the bank, who promised to make the proper transfer on its books, but failed to do so, though the certificate was thereafter treated and used by the bank as the property of the purchaser. *Held*, that defendant was not liable as a stockholder. (*Cox v. Elmendorf*, 37 S. W., 387; 97 Tenn., 518.)

*When vendee liable though transfer not made on books.*

- 14 (U. S. C. C. A., 1896). One S. subscribed for 50 shares of the stock of a national bank, borrowing the money to pay for them from C., the cashier of the bank. As collateral security for the money so borrowed, he indorsed over the certificate to C., and left it with him. A few months later he sold the stock to C. for the amount of the loan and accrued interest, the certificate remaining in C.'s hands. The bank was solvent at the time, and so continued for five years, during which C. collected the dividends on the stock, as shown by the bank's dividend book, but the stock was never actually transferred to C. on the books of the bank. The by-laws of the bank provided that

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

dividends should be paid to the stockholders in whose names the stock should stand; that certificates should be issued by the president and cashier; and that, when stock was transferred, the certificate should be canceled and a new one issued. Long after the sale of S.'s stock to C. the bank became insolvent, an assessment was made upon the stockholders, and the receiver of the bank, finding S.'s name as a stockholder on the books of the bank, brought suit against him. On the trial of the suit the foregoing facts were shown. C. was dead at the time of the trial. *Held*, that it might be inferred as a fact, from the evidence, that the bank had notice of the transfer of the stock by S. to C., and the termination of S.'s relation to the bank as stockholder, from which fact the legal presumption would follow that the bank would cause such acts to be done in relation to the transfer as its officers were called on to do, and that the jury should be permitted to draw such inference. (*Snyder v. Foster*, 73 Fed. Rep., 136.)

*Fraudulent transfer to escape individual liability.*

- 15 (U. S. C. C., 1877). Shareholders in a national bank, knowing it to be insolvent, transferred their shares for the purpose of escaping liability to creditors. *Held*, that as to such creditors the transfer was void. (*Bowden v. Santos*, 1 N. B. C., 271; 1 Hughes, 158.)
- 16 (U. S. C. C. A., 1897). It is not necessary, in order to hold liable for an assessment upon the shareholders of an insolvent national bank one who has transferred his stock to an irresponsible person, to show that the transferor had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure and made the transfer with intent to relieve himself from individual liability. (*Cox v. Montague*, 78 Fed. Rep., 845.)

*Transfer after insolvency fraudulent as to creditors.*

- 17 (U. S. C. C., 1883). After a national bank has become insolvent and has closed its doors for business, its shareholders' liability to creditors is so far fixed that any transfer of their shares must be held fraudulent and inoperative as against the creditors of the bank. (*Irons, executor, et al. v. Manufacturers' National Bank et al.*, 17 Fed. Rep., 308.)

*Transfer without consideration to insolvent person.*

- 18 (U. S. Sup. Ct., 1882). And where a shareholder who has knowledge of the insolvent condition of the bank transfers his shares without consideration to a person unable to respond to the assessment the transfer may be set aside. (*Bowden v. Johnson*, 107 U. S., 251.)
- 19 (U. S. C. C., 1897). Under Revised Statutes United States, section 5151, making shareholders in a national bank liable for the debts of the association, and section 5139, providing for the transfer of shares, with a provision that the transferee shall "succeed to all the rights and liabilities of the prior stockholders of such shares; and no change shall be made in the articles of the association by which the rights, remedies, and securities of the existing creditors of the association shall be impaired," a transfer of stock, though without consideration and to an irresponsible person, can not be set aside by the receiver, if made in good faith without knowledge of the failing condition of the bank. (*Sykes v. Holloway et al.*, 81 Fed. Rep., 432.)
- 20 (U. S. C. C., 1898). A stockholder in a national bank, with knowledge that the bank is in a failing condition, can not make a voluntary transfer of his stock to one financially irresponsible, and thereby escape liability for assessments. (*Baker v. Reeves et al.*, 85 Fed. Rep., 837.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

- 21 (U. S. C. C., 1898). The owner, by assignment of stock in a national bank at the time of its failure, is liable for assessments thereon, though his assignor, who transferred it knowing that the bank was in a failing condition, is also liable. (Ib.)

*Transfer to stockholder's infant children.*

- 22 (U. S. Dist. Ct., 1904). A transfer of stock in a national bank, while it is a going concern, to the stockholder's infant children, under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency. (Aldrich v. Bingham, 131 Fed. Rep., 363.)
- 23 (U. S. Dist. Ct., 1904). Where a stockholder in a State bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend check made payable by the bank to the order of such children, he was estopped to deny his liability for assessment levied on such stock by the Comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank. (Aldrich v. Bingham, 131 Fed. Rep., 363.)

*Transfer to avoid liability voidable; parties, practice, proof.*

24. A transfer of shares for the purpose of avoiding liability, though made "out and out," is void.  
(U. S. Sup. Ct., 1878) Germania National Bank v. Case, Receiver, 99 U. S., 628;  
(U. S. C. C.) Bowden v. Santos, 1 Hughes, 158.
- 25 (U. S. Sup. Ct., 1878). One to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. Where the owner, holder, or pledgee of stock transfers it out and out for the purpose of escaping liability as a shareholder to one who is unable to meet such liability, or when the transfer is colorable and not absolute, the transfer is ineffective as to creditors and the transferrer will be still liable. Therefore when the G. bank loaned money and took as collateral therefor shares of stock in the C. bank, which were duly transferred in the books on the C. bank, and afterwards the G. bank transferred these shares to one of its clerks, with an understanding that he should retransfer on request, and the C. bank was then in failing condition, *held*, that the G. bank was liable to contribute as a stockholder to the debts of the C. bank. (Germania National Bank v. Case, receiver, 2 N. B. C., 25; 99 U. S., 628.)
- 26 (U. S. Sup. Ct., 1898). One who holds shares of national-bank stock—the bank being at the time insolvent—can not escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, that it is insolvent or about to fail. (Stuart v. Hayden, 169 U. S., 1; Gruetter v. Stuart, ib.)
- 27 (U. S. Sup. Ct., 1898). A transfer with such intent and under such circumstances is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. (Ib.)
- 28 (U. S. Sup. Ct., 1898). The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute for its contracts, debts, and engagements, attaches when the bank becomes insolvent; and the shareholder can not, by trans-



## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

ferring his stock, compel creditors to surrender this security as to him, and force the receiver and creditors to look to the person to whom his stock has been transferred. (Ib.)

- 29 (U. S. Sup. Ct., 1898). If the bank be solvent at the time of the transfer—that is, able to meet its existing contracts, debts, and engagements—the motive with which the transfer is made is immaterial, as a transfer under such circumstances does not impair the security given to creditors; but if the bank be insolvent, the receiver may, without suing the transferee and litigating the question of his liability, look to every shareholder who, knowing or having reason to know at the time that the bank was insolvent, got rid of his stock in order to escape the individual liability to which the statute subjected him. (Ib.)
- 30 (U. S. Sup. Ct., 1898). Whether, the bank being in fact insolvent, the transferrer is liable to be treated as a shareholder in respect of its existing contracts, debts, and engagements, if he believed in good faith at the time of the transfer that the bank was solvent—not decided; although he may be so treated, even where acting in good faith, if the transfer is to one who is financially irresponsible. (Ib.)
- 31 (U. S. Sup. Ct., 1898). Where the circuit court and the circuit court of appeals agree as to what facts are established by the evidence, this court will not take a different view unless it clearly appears that the facts are otherwise. (Ib.)
- 32 (U. S. C. C., 1896). One C. was the holder of stock in the D. national bank, and was also an officer of the L. bank, which held stock in the D. bank. In the latter capacity he was informed of an urgent demand upon the L. bank to send \$5,000 by telegraph in aid of the D. bank. Within a week after this demand, L. transferred his stock in the D. bank, without consideration, to his five children, one of whom was a married woman, and two were minors. Within five months thereafter the D. bank failed, and an assessment was made on the stockholders. *Held*, that the transfers must have been made by L. in contemplation of the liability, and that both he and his transferees were liable for the assessment, the latter because the liability was cast upon them by law when they became stockholders. (*Foster v. Lincoln*, C. C., 74 Fed. Rep., 382.)
- 33 (U. S. C. C., 1897). The burden is on the receiver of a national bank to show that a transfer of stock was made by the transferrer for the fraudulent purpose of avoiding liability as a stockholder; and evidence showing that the husband of the transferrer had knowledge of the embarrassed condition of the bank before the transfer was made, and that she had admitted that she never transacted any business without the advice of her husband, is not sufficient for that purpose, as against the positive statement of the transferrer that no one ever suggested to her to transfer the stock for the purpose of relieving herself from liability, or suggested to her that the bank was in a failing condition, and that she made the transfer to her daughter as an advancement. (*Sykes v. Holloway et al.*, 81 Fed. Rep., 432.)
- 34 (U. S. C. C., 1900). In an action in equity to cancel a transfer of stock as fraudulently made by defendant to avoid a stockholder's liability, and for a decree against defendant for an assessment on the stock, a demurrer to the bill because plaintiff had an adequate remedy at law by ignoring the transfer and suing defendant as actual owner will be overruled, since the plaintiff is entitled to the relief prayed for, which could not be had at law, though such relief be only a technical advantage to plaintiff. (*Hedlund v. Dewey*, 105 Fed. Rep., 541.)
- 35 (U. S. C. C. A., 1905). To establish the liability of a stockholder in a national bank to creditors, on its failure, after he has made an actual out-and-out sale of his stock, and the same has been transferred on

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## VALIDITY AND EFFECT OF TRANSFER—continued.

the books, although the sale may have been made for the purpose of avoiding liability, three things must concur: (1) The bank must have been insolvent when the sale was made; (2) the seller must have known such fact, or be chargeable with knowledge of it; and (3) the transfer must have been made to one who was insolvent or unable to respond to an assessment, and whose financial condition was known, or ought to have been known, to the seller. (*McDonald v. Dewey et al.*; *Dewey v. McDonald*, 134 Fed. Rep., 528.)

- 36 (U. S. C. C. A., 1905). A stockholder in a national bank remains liable to creditors so long as the stock stands in his name on the books, although he may have sold it and delivered the certificate to the purchaser, unless he has done all that he can reasonably do to have the same transferred, by seeing that the certificate is delivered to the bank, with the proper power of attorney and data to enable the officers to make the transfer. (*Ib.*)

## LIABILITY OF TRUSTEE.

- 1 (U. S. C. C., 1898). A trustee, though not appointed by a will or an order of a court or judge, is not personally liable for assessments against stock of an insolvent national bank owned by this *cestui que trust*, but standing in his name, where he has been guilty of no fraud, concealment, or negligence. (*Lucas v. Coe*, 86 Fed. Rep., 972.)
- 2 (U. S. C. C., 1898). In fixing the liability for assessments against stock of an insolvent national bank, the effort of the court should be to ascertain who is the actual owner, and to hold him, releasing the apparent owner if he has done nothing to deceive or mislead. (*Ib.*)
- 3 (U. S. C. C., 1893). A person who is entered on the books of a national bank as the owner of stock, but who is admitted to hold the stock in trust for the true owner, is not liable as a stockholder for the debts of the bank, when the true owner has been adjudged so liable, although nothing is realized upon the execution of such judgment. (*Yardley v. Wilgus*, 56 Fed. Rep., 965.)
- 4 (U. S. Dist. Ct., 1877). A trustee holding shares in a national bank can not avail himself of his exemption from personal liability for debts of the bank unless his trusteeship appears on the books of the bank. (*Davis v. Essex Baptist Society*, 44 Conn., 582; 2 N. B. C., 110.)
- 5 (U. S. Dist. Ct., 1877). With a bequest of money a religious society purchased, and held in its own name, shares in a national bank. The society had other donations otherwise invested. *Held*, that the society was not a trustee, but an ordinary stockholder, and liable to assessment for debts of the insolvent bank. (*Ib.*)
- 6 (Ky. App., 1901). Where a guardian, as such, is owner of shares in a national bank, neither the guardian nor the ward are personally liable, but only the estate of the ward in the guardian's hands is liable. (*Clark v. Ogilvie*, 63 S. W., 429.)
- 7 (Md., 1897). A person appearing on the books of a national bank to be absolute owner of stock is subject to stockholders' liability, though holding it as trustee. (*Kerr v. Urie*, 37 A., 789; 86 Md., 72.)

*Who is not a trustee within section 5152, Revised Statutes.*

- 8 (U. S. C. C. A., 1895). Defendant purchased bank stock with his own means, held it for a year, and collected and appropriated all the dividends thereon, and, when notified by the bank that the stock stood in his name on the books, gave no notice that he held it in trust for another person, but permitted the bank to deal with him as the beneficial owner and did not tender the stock to or demand reimbursement from any other person. *Held*, that he was estopped to claim after the insolvency of the bank that he held the stock merely as trustee for another. (*Horton v. Mercer*, 71 Fed. Rep., 153.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF TRUSTEE—continued.

- 9 (U. S. C. C. A., 1895). One who purchases stock in a national bank with his own money on the suggestion of another person that the latter would buy such stock as the former "could get hold of," without being under any obligation to convey the stock to the other, is not a trustee within the meaning of Revised Statutes, section 5152, exempting a person holding stock as trustee from personal liability as a shareholder. (Ib.)

## LIABILITY OF PLEDGEE.

*When pledgee becomes owner and chargeable.*

- 1 (U. S. C. C. A., 1905). As a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended. (*Hulitt v. Ohio Valley National Bank*, 137 Fed. Rep., 461.)
- 2 (U. S. C. C. A., 1905). For the purposes of the national banking act, the pledgor of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another. Where the pledgee caused the stock to be transferred on the books of the bank to an irresponsible employee and credited the pledgor with the value of said stock the transaction would operate to transfer the ownership of the stock to the pledgee and would make him liable to an assessment. (Ib.)
- 3 (U. S. C. C., 1877). One who procures a transfer to himself, on the books of a national bank, of stock in such bank, becomes liable for the engagements of the bank as prescribed in the national-bank act, although such stock was pledged to him by the owner simply as security for a debt. (*Moore v. Jones*, 3 Woods, 53; 2 N. B. C., 144.)
- 4 (U. S. C. C., 1877). One in whose name shares of the stock of a national bank stand on the bank books is subject to the individual liability of a shareholder, although his holding of the stock was originally as collateral security for a loan and the loan has been repaid and the stock certificate surrendered with an executed power of attorney for transfer. (*Bowdell v. Farmers and Merchants' National Bank of Baltimore*, 14 Bankers' Magazine, 387; 2 N. B. C., 146.)
- 5 (La., 1895). The pledgee of stock under a contract to sell on default of the payment of a note for which the stock is pledged, who, by judicial proceedings, has compelled the transfer on the books of the stock to himself, will be deemed, in the absence of complaint by the debtor, to have acquired the stock as owner. (*Succession of Linaux*, 17 So., 200; Appeal of *Hibernia National Bank*, ib.; 47 La. Ann., 643.)
- 6 (Md. App., 1876). Persons who hold stock of a national bank in pledge the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the national banking act, stockholders, and so long as they thus hold the stock in pledge are responsible to the creditors of the bank in proportion to the amount so held. (*Magruder v. Colston*, 1 N. B. C., 554; 44 Md., 349.)

*Pledgee who appears as owner on books liable.*

- 7 (U. S. Sup. Ct., 1878). Party who, as security for a loan, accepts stock which he causes to be transferred to him on the books, incurs liability as a stockholder and is not relieved by colorable transfer with understanding that he may have it back on request. (*Germania National Bank v. Case*, 99 U. S., 628.)

*When pledgee not liable.*

- 8 (U. S. Sup. Ct., 1884). But a pledgee of shares of stock in a national bank who, in good faith and with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee for the avowed

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF PLEDGEE—continued.

- purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure. (*Anderson, Receiver, v. Phila. Warehouse Company*, 111 U. S., 479.)
- 9 (U. S. Sup. Ct., 1900). A pledgee of stock of a national bank, who sells it in accordance with the terms of the pledge and becomes the purchaser, but never has it transferred on the books of the bank, is not liable for an assessment made under Revised Statutes, section 5151, on the bank's insolvency. (*Robinson v. Southern National Bank of New York*, 180 U. S., 295.)
  - 10 (U. S. C. C. A., 1897). A corporation which receives shares of national-bank stock in pledge, with power to use and sell, and which, in good faith, without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employees, merely because it is unwilling they should stand in the name of the original owners, remains a mere pledgee, and is not liable, as a shareholder, to assessment on the stock. (*National Park Bank of City of New York v. Harmon*, 79 Fed. Rep., 891.)
  - 11 (U. S. C. C., 1888). A pledgee of shares of stock in a national bank who does not appear by the books of the bank or otherwise to be the owner is not liable for an assessment upon the shares on the insolvency of the bank, under Revised Statutes, section 5151, rendering shareholders liable for the debts of the association to the extent of the par value of their stock. (*Welles v. Larrabee et al.*, 36 Fed. Rep., 866.)
  - 12 (U. S. C. C., 1888). One to whom the shares are assigned in trust as security for a debt due a third person, and following whose name on the stock book of the bank is the word "trustee," is not liable for the assessment under section 5151, and is also within the provision of section 5152, exempting from such liability persons holding stock as trustees. (*Ib.*)
  - 13 (U. S. C. C., 1900). A pledgee of shares of stock in a national bank, with a power of attorney in blank to transfer the same indorsed thereon and signed by the pledgor, does not become liable as owner for an assessment thereon by causing them to be transferred on the books of the bank to a third person for the purpose of being held by him as trustee for both parties, and in accordance with the contract of pledge, although the pledgor did not expressly authorize such transfer. (*Hayes v. Fidelity Insurance, Trust, and Safe-Deposit Co.*, 105 Fed. Rep., 160.)
  - 14 (U. S. C. C. A., 1901). A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder and liable to assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employee, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the Comptroller to make good the impaired capital of the bank and charging the amount to the pledgor. (*Higgins v. Fidelity Insurance, Trust, and Safe-Deposit Co.*, 108 Fed. Rep., 475.)
  - 15 (U. S. C. C. A., 1900). It is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national-bank stock, instead of the owner, upon whom the legal obligation rests; and where stock stood upon the books of the bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF PLEDGEE—continued.

not estopped to show that it held the stock as collateral only, at least in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership. (*Frater, Receiver, v. Old National Bank of Providence*, 101 Fed. Rep., 391.)

- 16 (U. S. C. C. A., 1900). A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a stockholder, can not be treated as one and subjected to an assessment under Revised Statutes, section 5151, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt. (*Wilson v. Merchants' Loan and Trust Co. of Chicago*, Ill., 98 Fed. Rep., 688.)
- 17 (U. S. C. C., 1900). A pledgee of national-bank stock can be held liable for an assessment thereon only on the ground of estoppel, and the burden of showing such estoppel rests upon the receiver suing to recover such assessment. (*Tourtletot v. Stolteben*, 101 Fed. Rep., 362.)

*Pledgee not liable unless stock is in his name.*

- 18 (U. S. Sup. Ct., 1878). A national bank, having so received stock of another national bank, was sued as a stockholder. *Held*, that loan by national bank on such security is not prohibited, and if it were, defendant could not avoid liability by its own illegal act. (*Germania National Bank v. Case*, 99 U. S., 628.)
- 19 (U. S. Sup. Ct., 1900). The State National Bank of Vernon, Tex., having become insolvent, Robinson was appointed receiver, and the Comptroller made an assessment upon the stock and its owners. This action was brought to recover such assessment from the Southern National Bank. One hundred and eighty shares of the stock so assessed were the property of one Curtis. His certificates were deposited with the Southern Bank as collateral, but the stock remained in his name and so continued to the commencement of this suit. *Held*, that the case was not one in which the bank was estopped by having assumed an apparent ownership of the stock. (*Robinson v. Southern National Bank*, 180 U. S., 295.)
- 20 (U. S. Sup. Ct., 1900). By the mere act of bidding in this stock at a nominal price the Southern National Bank is not to be regarded as having subjected itself to liability as the real owner thereof. (Ib.)
- 21 (U. S. Sup. Ct., 1900). As between the Southern National Bank and Curtis and Thomas the bank is under no legal or equitable obligation to assume or answer for the assessment made by the Comptroller on the stock. (Ib.)
- 22 (U. S. Sup. Ct., 1900). *California Bank v. Kennedy* (167 U. S., 362) and *First National Bank of Concord v. Hawkins* (174 U. S., 364) followed, but this court is not disposed at present to push the principle of these cases so far as to exempt such banks from liability as other shareholders when they have accepted and hold stock of other corporations as collateral security for money advanced (which is not decided). (Ib.)
- 23 (U. S. Sup. Ct., 1900). There is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares. (Ib.)
- 24 (U. S. Sup. Ct., 1897). A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee and as collateral security for the payment of his debt, is not a shareholder subject to the personal liability imposed upon shareholders by Revised Statutes, section 5151. (*Pauly v. State Loan and Trust Company*, 165 U. S., 606.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## GENERAL PROPOSITIONS AS LAID DOWN BY THE SUPREME COURT IN REGARD TO LIABILITY OF SHAREHOLDERS.

1 (U. S. Sup. Ct., 1897). The previous cases relating to the liability of such stockholder examined and held to establish—

1. That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151 (*Pauly v. State Loan and Trust Company*, 165 U. S., 606) ;

2. That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts, and engagements of the association ;

3. That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed ;

4. That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151 ; and

5. That the pledgee of personal property occupies toward the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor. (Ib.)

2 (U. S. Sup. Ct., 1903). The following propositions may be considered as settled in regard to the liability of shareholders of national banks under section 5151, Revised Statutes (*Rankin v. Fidelity Insurance, Trust and Safe-Deposit Company*, 189 U. S., 242) :

1. Liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. Nor can the real owner exonerate himself from the responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. (Ib.)

2. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others. (Ib.)

3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. But it is otherwise if he allow his name to appear on the book as owner, or being the owner, makes a colorable transfer of the stock. (Ib.)

Where it was shown that a trust company loaned on shares of a then solvent and dividend-paying national bank, and accepted its

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## GENERAL PROPOSITIONS AS LAID DOWN BY THE SUPREME COURT IN REGARD TO LIABILITY OF SHAREHOLDERS—continued.

stock as collateral, and subsequently the pledgor failed, and the trust company caused the stock to be transferred to one of its employees, paid an assessment subsequently levied upon the stock, and charged it to the pledgor, and frequently wrote to ascertain if there was any market for the stock, stating that it was held as collateral. *Held*, that although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character taken in connection with other facts and circumstances, it is one which is properly referred to a jury, and as this case really turned upon the actual ownership of the shares, such question of ownership was properly left to the jury as one of fact.

*Held*, that the pledgee is not bound by statements made without its knowledge by the assignees of the pledgors upon the schedules of liability to the effect that the pledgee had converted the stock. (Ib.)

## LIABILITY OF MARRIED WOMAN.

- 1 (U. S. Sup. Ct., 1890). The coverture of a married woman who is a shareholder in a national bank does not prevent the receiver of the bank from recovering judgment against her for the amount of an assessment levied upon the shareholders equally and ratably under the statute. (*Keyser v. Hitz*, 133 U. S., 138.)
2. Where a married woman is by the State law capable of holding stock in a national bank in her own right, she is liable to an assessment upon her shares, though the law of the State does not authorize married women to bind themselves by contracts for the payment of money. The law annexes her obligations by its own force; no act or capacity to act on her part is required:
  - (U. S. C. C., 1887) *Witters v. Sowles*, 32 Fed. Rep., 767;
  - (U. S. C. C., 1888) *Witters v. Sowles*, 35 Fed. Rep., 640;
  - (U. S. C. C., 1891) *In re First National Bank of St. Albans*, 49 Fed. Rep., 120;
  - (U. S. C. C., 1894) *Robinson v. Turrentine*, 59 Fed. Rep., 554.
- 3 (U. S. C. C. A., 1905). A married woman, who was a stockholder in a national bank at the time it became insolvent, is subject to the statutory liability for an assessment made thereon, at least in the absence of any State statute disabling her from owning the stock in her own right. (*Christopher et al. v. Norvell*, 134 Fed. Rep., 842.)
- 4 (U. S. C. C., 1891). Married women who are permitted by the laws of the State in which they reside to become shareholders in national banks are liable to assessments under the national banking laws. (*In re First National Bank of St. Albans*, 49 Fed. Rep., 120.)
- 5 (U. S. C. C., 1894). Code of North Carolina, section 1826, provides that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the written consent of her husband. *Held*, that a purchase of stock by a married woman is not a "contract" within the terms of the statute, and that the wife is liable upon an assessment, although the stock was purchased without the written consent of her husband. (*Robinson v. Turrentine et al.*, 59 Fed. Rep., 554.)
- 6 (Md., 1897). Where one residing in Maryland subscribes for stock of a national bank of another State and then transfers it to his wife, also a resident of Maryland, she becomes owner thereof, and is subject to stockholders' liability, under Revised Statutes United States, section 5152, without regard to the laws of the other State relative to contract by married women. (*Kerr v. Urie*, 37 A., 789; 86 Md., 72.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF HEIRS AND LEGATEES.

*Heirs liable to the extent of their distributive share.*

- 1 (U. S. Sup. Ct., 1900). Enforcing the whole amount of an assessment on national bank stock, to the extent of the distributive share received against one of the heirs or next of kin, to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate pursuant to the statutes of Minnesota, does not violate any rights under the Federal statutes. (*Matteson v. Dent*, 176 U. S., 521.)

*Devise of stock, transfer by executor.*

- 2 (U. S. C. C. A., 1895). One D., a stockholder in the W. bank, died in 1882, leaving a will by which he gave all his property to his wife for life, "to be hers absolutely;" and at her death to go to his son and daughter, to be divided between them as his wife might think proper. D.'s wife qualified as executrix and took possession of the estate, but did not transfer the bank stock. She died in 1888, leaving a will disposing of the property, upon the assumption that she had entire power of disposition of it, and her disposition of it was acquiesced in by her son and daughter. One F., who was appointed executor of Mrs. D.'s will, qualified as such, and thereby became executor of D. He caused the bank stock to be transferred to his name as "executor," and testified that he meant thereby executor of Mrs. D. The bank officer who made the transfer testified that he understood the stock was transferred to F., as executor of Mrs. D. At the time of the transfer, in 1888, the bank was solvent and prosperous. The stock was held by F. as part of a trust fund created by Mrs. D.'s will for her daughter, as a means of paying a debt from D. to the daughter, in such a way as to keep the money beyond the control of the daughter's husband. The W. bank failed in 1891, and the receiver sought to hold the estate of D. responsible for an assessment on the stockholders. *Held*, that as the stock could only have been transferred by the act of D.'s executor, and as F. declared, and the bank understood when the transfer was made, that it was made to him as executor of Mrs. D., and he had power to receive it in that capacity, without regard to the terms of the wills, the bank, and consequently the receiver, were estopped to claim that D. and his estate had not ceased to hold stock at the time of the transfer, there being no ground to impute bad faith to any of the parties. (*Ricaud v. Wilmington Savings and Trust Co. et al.*, 70 Fed. Rep., 424.)
- 3 (U. S. C. C. A., 1895). M. bequeathed to his wife "for life or widowhood" 40 shares of stock in a national bank, together with other personal property, providing that she might use any of such personal property if necessary for her comfortable support, and that at her death or marriage whatever should remain of such property should go in equal shares to his four children. The administrator with the will annexed of M.'s estate transferred the stock on the books of the bank to M.'s widow. The bank having become insolvent, and an assessment having been made by the Comptroller on the shareholders, for which a judgment was obtained against M.'s widow, which remained unsatisfied, the receiver of the bank brought suit against M.'s administrator to compel payment of the assessment out of M.'s general estate. *Held*, that whether the widow took an absolute title to the stock by virtue of her power of disposal, or a life interest with remainder to the children, the beneficial ownership of the stock, in either case, had passed from M.'s estate, and the estate could not be made liable for the assessment. *Held*, further, that the administrator properly transferred the stock to the widow, and was not required to hold the legal title thereto, as administrator or trustee, during her life or widowhood, but that such transfer made no difference to the liability of the estate of M., since the beneficial interest would in either case have been in the widow and children. (*Blackmore v. Woodward et al.*, 71 Fed. Rep., 321.)



## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF HEIRS AND LEGATEES—continued.

*Transfer of bank stock to residuary legatee—Insufficiency of assets.*

- 4 (U. S. C. C., 1887). An executor representing that he had sufficient assets to pay all legacies, but filing no inventory, obtained a decree that he pay the legacies and that the residue be paid to the residuary legatee, and afterwards transferred to the residuary legatee, with her assent, certain shares of bank stock belonging to the estate, the dividends on which were afterwards paid to the executor, who was the husband of the residuary legatee. The remaining assets were insufficient to satisfy the legacies. In an action brought to charge the estate with an assessment on the stock, *held*, that the transfer was valid, and passed the title to the residuary legatee. (Witters, Receiver, v. Sowles, Executor, et al., 32 Fed. Rep., 130.)

*Liability of legatees and devisees.*

- 5 (U. S. C. C., 1887). Under Revised Statutes United States, section 5151, rendering shareholders individually responsible for the liabilities of a national bank to the extent of the value of their stock, and section 5152, providing that the estate of a shareholder in the hands of the executor shall be liable in like manner and to the same extent that the testator would be if living—assets which have been transferred to legatees or devisees can not be subjected to liabilities of the bank accruing after the transfer. (Ib.)

*When legatee liable before actual delivery.*

- 6 (U. S. C. C., 1887). Where the court had ordered the transfer of stock to a legatee, but the executor failed to actually deliver it until after the failure of the bank, the legatee is chargeable with the assessment. (Ib.)

## LIABILITY WHEN STOCK IS PURCHASED IN NAME OF MINORS.

- 1 (U. S. C. C., 1896). A father purchased stock in a bank in the name of his minor son. Thereafter the bank failed, and an assessment was made on the stock. After the assessment, but before suit was brought to recover it, the son became of age and assented to holding the stock. *Held*, that, as the cause of action accrued at the time of the assessment, and the son was incapable of assenting at that time, the father became and remained liable for the assessment. (Foster v. Wilson et al., 75 Fed. Rep., 797.)
- 2 (U. S. C. C., 1896). One buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders, so as to bind themselves to the liabilities thereof. (Foster v. Chase et al., 75 Fed. Rep., 797.)

## LIABILITY OF OTHER NATIONAL BANK OWNING STOCK IN INSOLVENT BANK.

(See also LIABILITY OF PLEDGEE, ANTE.)

*Bank may take corporate stock as collateral.*

- 1 (U. S. Sup. Ct., 1897). The statutes of the United States relating to the organization and powers of national banks prohibit such banks from purchasing or subscribing to the stock of another corporation, although they may, as incidental to the power to loan money on personal security, accept stock of another corporation as collateral, and thus become subject to liability as other stockholders. (California Bank v. Kennedy, 167 U. S., 362.)
- 2 (U. S. Sup. Ct., 1897). Where the stock was purchased as an investment, the want of such authority may be set up by a bank to defeat an attempt to enforce against it the liability of a stockholder. (Ib.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF OTHER NATIONAL BANK OWNING STOCK IN INSOLVENT BANK—cont'd.

*Purchase of stock by national banks.*

- 3 (U. S. Sup. Ct., 1899). The investment by the First National Bank of Concord, N. H., of a part of its surplus funds in the stock of the Indianapolis National Bank, of Indianapolis, Ind., was an act which it had no power or authority in law to do, and which is plainly against the meaning and policy of the statutes of the United States and can not be countenanced; and the Concord corporation is not liable to the receiver of the Indianapolis corporation for an assessment upon the stock so purchased made under an order of the Comptroller of the Currency to enforce the individual liability of all stockholders to the extent of the assessment. The doctrine of estoppel does not apply to this case. (*First National Bank of Concord v. Hawkins*, 174 U. S., 364.)
- 4 (U. S. C. C. A., 1899). It is ultra vires of a banking corporation, upon which has been conferred only the power to do a banking business, to purchase stock in another corporation merely as an investment, and such a purchase can not be validated by estoppel, so as to render the bank liable as a stockholder. The bank is not liable although it retained such stock until the bank became insolvent and received dividends thereon. (*Schofield v. Goodrich Bros. Banking Co.*, 2 Banking Cases, 253; 98 Fed. Rep., 271.)
- 5 (U. S. C. C. A., 1904). A national bank has no power to invest its surplus fund in the stock of another national bank, and can not be assessed thereon as a stockholder, although it actually made the purchase and held and received dividends on the stock. (*Shaw v. National German-American Bank of St. Paul, Minn.*, 132 Fed. Rep., 658.)
- 6 (Kans. Sup., 1902). In an action against a national bank upon its double liability as a stockholder in another corporation, it was alleged in the petition that it acquired such stock in a particular manner. The evidence showed that it acquired it in a different manner, neither of which was ultra vires. *Held*, that there was not a fatal variance between allegations and proof; the vital fact being, was the bank a stockholder, not how did it become such. (*First Nat. Bank of Cherryvale v. Montgomery County Nat. Bank*, 67 Pac. Rep., 458; 64 Kans., 134.)

*National bank may plead that its purchase of stock in another national bank was ultra vires.*

- 7 (Cal. Sup., 1898). A national bank which deals in stocks of another corporation, in violation of the national banking law, may plead its want of authority in avoidance of liability as a stockholder; and this, though it accepted dividends on such stock. (*Chemical National Bank v. Havermale*, 52 Pac. Rep., 1071; 120 Cal., 601.)

## LIABILITY OF STATE BANK OR INSURANCE COMPANY OWNING STOCK IN NATIONAL BANK.

- 1 (U. S. C. C. A., 1896). A State bank which, under its charter, had power to accept stock in a national bank as security for a loan, or to acquire such stock by levy and sale under execution to satisfy a debt due to it, but which had no power to purchase such stock as an investment, purchased shares of the stock of a national bank, which were transferred to it on the books of the national bank. The latter bank subsequently became insolvent, and an assessment upon the stockholders was made by the Comptroller of the Currency, payment of which was resisted by the State bank on the ground that the purchase of the stock was ultra vires. *Held*, that as the purchase of the stock was merely the exercise, for an unauthorized purpose, of a power existing for other and legitimate purposes, the defense of ultra vires was not available. (*Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. Rep., 369.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## LIABILITY OF STATE BANK OR INSURANCE COMPANY OWNING STOCK IN NATIONAL BANK—continued.

- 2 (U. S. C. C. A., 1896). The decision in *Bank v. Hawkins*, 71 Fed. Rep., 369, followed and applied to the case of an insurance company authorized to hold stock of a national bank as an investment of surplus but not of capital, which had invested a part of its capital in such stock. (*Cooper Insurance Company v. Hawkins*, 71 Fed. Rep., 372.)

## ASSESSMENT ENFORCEABLE AGAINST SHAREHOLDER'S ESTATE.

- 1 (U. S. Sup. Ct., 1887). Under the national banking act, the individual liability of the stockholder survives as against the personal representatives of a deceased stockholder. (*Richmond v. Irons*, 121 U. S., 27; 3 N. B. C., 211.)
2. And the fact that the title to the stock of a deceased shareholder vests in his administrator does not relieve the estate from the burden of an assessment.  
(U. S. Sup. Ct., 1887) *Richmond v. Irons*, 121 U. S., 27;  
(U. S. C. C., 1894) *Wickham v. Hull*, 60 Fed. Rep., 326;  
(Conn.) *Davis v. Weed*, 44 Conn., 569.
- 3 (U. S. Sup. Ct., 1900). Allottees to whom there has been an allotment of national bank stock in indivision, in proportion to their interest in the estate, are liable, under United States Revised Statutes, sections 5139, 5151, 5152, etc., to assessments upon such stock, although it is registered on the books of the bank in the name of the intestate, the bank not having been notified of the allotment, upon the subsequent insolvency of the bank. (*Matteson v. Dent, Receiver*, 2 Banking Cases, 469; 176 U. S., 521.)
- 4 (U. S. Sup. Ct., 1900). The fact that the time for filing claims against a deceased shareholder's estate has elapsed does not prevent the estate of the distributees from being held for the assessment. (*Matteson v. Dent*, 176 U. S., 521.)
- 5 (U. S. C. C. A., 1895). The personal liability of a deceased stockholder's estate in the hands of his personal representatives should be assessed against those for whose use the stock is held and a judgment against the personal representative for the liability should not be satisfied out of the general assets of the estate. (*Blackmore v. Woodward et al.*, 71 Fed. Rep., 321.)
- 6 (U. S. C. C., 1898). The estate in the hands of an executrix at the date of the failure of a national bank is liable for the assessment on stock belonging to the estate in the same manner as if deceased was living (Rev. St., sec. 5152); and the fact that the time for filing claims against the estate has expired is no bar to an action to fix such liability. (*Zimmerman v. Carpenter*, 84 Fed. Rep., 747.)
- 7 (U. S. C. C. A., 1895). An executor who receives certificates of national bank stock as part of the assets of decedent's estate, and includes them in his inventory returned to the probate court, is a shareholder, and liable as such for an assessment under Revised Statutes, section 5151, subject to the relief granted by section 5152. (*Parker v. Robinson*, 71 Fed. Rep., 256.)
- 8 (U. S. Dist. Ct., 1900). An executrix is liable as such, under Revised Statutes 5152, for assessment made by the Comptroller on shares of stock in national bank held by her and issued to the estate of her testator in exchange for shares held by the testator in his lifetime and surrendered by her on a reduction of the capital stock of the bank. (*Brown v. Ellis*, 103 Fed. Rep., 834.)
- 9 (U. S. C. C., 1900). A testator directed by his will that a daughter's share in his estate should remain in the hands of his executors and be

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## ASSESSMENT ENFORCEABLE AGAINST SHAREHOLDER'S ESTATE—continued.

invested by them, and the income paid to the daughter during her life, and at her death the part of the estate so "held in reserve" by the executors should revert to the general estate.

The executors set apart as a portion of the daughter's share certain shares of stock in a national bank held by the testator and caused the same to be transferred on the books of the bank to themselves as "trustees." *Held*, that the legal title to such shares devolved upon them as executors, and they have no power to divest themselves of such title by any transfer and that an action to recover an assessment on the stock was properly brought against them as executors, and especially where the assessment was not made until after the daughter's death. (*Earle v. Rogers et al.*, 105 Fed. Rep., 208.)

- 10 (U. S. C. C., 1894). The estate of a deceased owner of national-bank stock is liable (Rev. St., sec. 5152) to an assessment levied against his executors in consequence of the failure of the bank after his death. (*Wickham v. Hull et al.*, 60 Fed. Rep., 326.)
- 11 (U. S. C. C., 1898). The widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person can not, on the ground that the estate is fully settled, escape liability as executrix for assessments on such stock to the extent of assets of the estate under her control. (*Baker v. Beach et al.*, 85 Fed. Rep., 836.)
- 12 (Conn.). Nor will the fact that the administration is complete and all the assets have been distributed defeat an action brought to recover the assessment. (*Davis v. Weed*, 44 Conn., 569.)
- 13 (Wyo., 1897). The assessment in not a lien against the estate of the deceased stockholder and is not a preferred claim. (*In re Beard's Estate*, 50 Pac. Rep., 226; 7 Wyo., 104.)

## COMPOUNDING SHAREHOLDER'S LIABILITY.

*When ineffectual.*

- 1 (U. S. C. C., 1879). A court has no power, under section 5324, United States Revised Statutes, to order the receiver of a national bank to compound debts which are not "bad or doubtful," and a composition under such an order of debts not "bad or doubtful," as the debt of a shareholder arising on his subscription to the stock, is ineffectual. (*Price v. Yates*, 19 Alb. L. J., 295; 2 N. B. C., 204.)

*Compounding, when not allowed.*

- 2 (U. S. Dist. Ct., 1892). A Federal court will not, even if it has the power under Revised Statutes, section 5234, grant an order authorizing a receiver of a national bank to compound the statutory liability of certain stockholders by accepting payment of a gross sum, less than is due, in satisfaction and discharge thereof, although more money would thus be realized than by proceeding to collect the same in the usual way, when it appears probable that such stockholders have fraudulently conveyed their property to avoid their legal obligations as stockholders, or to shield themselves from injury and exposure by litigation. (*In re Certain Shareholders of the California National Bank of San Diego*, 53 Fed. Rep., 38.)
- 3 (U. S. C. C., 1899). A judgment recovered by the receiver of an insolvent national bank against a stockholder on an assessment made by the Comptroller, although uncollectible, is not a "bad or doubtful debt," which a court may authorize the receiver to compound under Revised Statutes, section 5234. (*In re Earle*, 96 Fed. Rep., 678.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## INTEREST ON ASSESSMENT.

- 1 (U. S. Sup. Ct., 1876). The assessments made by the Comptroller upon the shareholders of an insolvent association bear interest from the date of the order. (*Casey v. Gall*, 94 U. S., 673.)
- 2 (U. S. Sup. Ct., 1882). The liability of the stockholders bears interest from the date of a letter of the Comptroller of the Currency directing enforcement of stockholders' personal liability. (*Bowden v. Johnson*, 107 U. S., 251.)
- 3 (U. S. Sup. Ct., 1887). A shareholder in a national bank, who is liable for its debts, is liable for interest thereon to the extent of the bank's liability, and not in excess of the maximum liability fixed by statute. (*Richmond v. Irons*, 121 U. S., 27.)
- 4 (Nebr. Sup., 1898). An assessment levied by the Comptroller of the Currency on a stockholder of a national bank draws interest from the date such assessment is made payable. (*Davis's Estate v. Watkins*, 76 N. W., 575; 56 Nebr., 288.)

## SHAREHOLDER CAN NOT PREFER CREDITOR.

*Stockholder's mortgage after bank's failure void.*

- 1 (U. S. C. C., 1888). Section 2, act Congress June 30, 1876 (19 Stat. L., 63), provides that the individual liability of shareholders of an insolvent national bank, fixed by Revised Statutes, section 5151, "may be enforced by any creditor of such association by a bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors." *Held*, that a mortgage of all his individual property executed by a cashier and stockholder of such bank, after it had closed its doors, to secure a depositor, amounted to a preference, and was void as against a judgment recovered against the cashier by the receiver under Revised Statutes, section 5151, either in the hands of the receiver or in those of a purchaser from him for value. (*Gatch v. Fitch et al.*; *Sunman v. Gatch et al.*, 34 Fed. Rep., 566.)

## SET-OFF AGAINST ASSESSMENT.

*When allowed.*

- 1 (U. S. C. C., 1889). In an action by the receiver of an insolvent national bank to recover of a stockholder an assessment on his shares, the defendant alleged as a counterclaim that the Comptroller of the Currency had directed the bank to restore the value of certain securities held by it which had been reported worthless by an examiner; that certain of the stockholders, including defendant, had raised a fund which was placed in the hands of trustees to apply so much as might be from time to time required by the Comptroller to retire such securities; that the fund was deposited with the bank with full notice of the purpose to which it was to be applied; that a portion had been used to retire the securities designated, and that when the bank failed the balance of the fund came into the hands of the receiver, and was now claimed by him as a part of the ordinary assets of the bank; that a certain portion of this balance belonged to defendant, which amount he asked to set off against plaintiff's demand. *Held*, that a general demurrer based on the ground that no set-off or counterclaim was available in such an action would be overruled, as the claim could be set off if it was of such a nature that the holder would be entitled to receive the full amount before distribution by the receiver to general creditors. (*Welles v. Stout*, 38 Fed. Rep., 807.)
- 2 (Ohio, 1892). When a subscriber to unauthorized increases of stock in a national bank pays thereon, he may, on the insolvency of the bank, set off such payment against his debt due the bank. (*Armstrong v. Law*, 27 W. L. Bul., 100.)

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## SET-OFF AGAINST ASSESSMENT—continued.

*Dividends may be set off against an assessment.*

- 3 (Ohio). The indebtedness of the stockholders on their individual liability, together with the other assets of the insolvent bank, constitute a trust fund for the benefit of its creditors; and in equity such indebtedness of a stockholder who is insolvent may be set off against a dividend payable out of the trust fund, on a balance due him on his deposit account with the bank at the time of its failure. (King et al. v. Armstrong, receiver, 34 N. E., 163; 50 Ohio St., 222.)
- 4 (Ohio). An assignment by the stockholder of his claim against the bank, before the direction of the Comptroller to enforce his liability, but after the insolvency of the bank, does not affect the right to set off his liability against the dividend due on his claim, nor does the fact that the Comptroller, at the time of the assignment, had not determined the amount necessary to be collected from the stockholders for the payment of the creditors. It is sufficient that such direction has been given, and amount so determined when the set-off is made. (Ib.)

*When not allowed.*

5. Payments of assessments by stockholder in national bank on increased stock can not be applied, in law or in equity, to discharge assessments by Comptroller in final liquidation of the bank.  
(U. S. Sup. Ct., 1891) *Pacific National Bank v. Eaton*, 141 U. S., 227;  
(U. S. Sup. Ct., 1891) *Thayer v. Butler*, 141 U. S. 234;  
(U. S. Sup. Ct., 1891) *Butler v. Eaton*, 141 U. S., 240;  
(U. S. C. C., 1885) *Morrison v. Price, Receiver*, 23 Fed. Rep., 217.
- 6 (U. S. Sup. Ct., 1886). Where shareholders have assessed themselves to the amount of the par value of the stock for the purpose of restoring impaired capital, the contributions made in pursuance of such assessment, though all used in paying the debts of the association, will not so operate as to discharge the shareholders from their individual liability. It makes no difference that it was made under the mistaken supposition that it would extinguish such liability and that the proceedings took place while the bank was under the supervision of the Comptroller acting through the bank examiner where the mistake was not caused by any misrepresentation on the part of the creditors. (*Delano v. Butler*, 118 U. S., 634.)
- 7 (U. S. Dist. Ct., 1881). A stockholder can not set off his individual claim on a national bank against his liability for an assessment. (*Hobart, Receiver, v. Gould*, 8 Fed. Rep., 57.)
- 8 (U. S. C. C. A., 1896). The amount of a stockholder's deposit in a national bank can not be set off against an assessment made by the Comptroller against his stock. (*Wingate v. Orchard*, 75 F. R., 241. Contra: (Ohio, 1880) *Brownell v. Armstrong*, 20 W. L. B., 465.)
- 9 (U. S. C. C., 1887). In an action by a receiver of an insolvent bank to charge the estate of a shareholder with an assessment on his shares, the executor claimed, by way of set-off, that property belonging to the estate had been delivered to the bank, upon the understanding that it should be applied on the assessment if the bank should fail. *Held*, not a proper subject to set off, even though the bank examiner assented to the agreement. (*Witters, Receiver, etc., v. Sowles, Ex'r.* 32 Fed. Rep., 130.)
- 10 (U. S. C. C., 1889). Defendant, for the purpose of helping a bank, of which complainant was a stockholder, in a financial crisis loaned it certain securities belonging to complainant, and when complainant was informed of the fact she did not object. She was assured by the bank's officers that if the bank was saved the securities would be returned, and if it failed the avails would be credited on her assessment as a stockholder. The bank failed, and the securities were not

## SHAREHOLDERS—Continued.

## ASSESSMENTS—Continued.

## SET-OFF AGAINST ASSESSMENT—continued.

returned. *Held*, that she was not entitled, as against other creditors, to set off the value of the securities against her assessment, but was, as to such value, on the same footing as any other creditor. (Sowles v. Witters et al., 39 Fed. Rep., 403.)

- 11 (U. S. C. C., 1895). The F. National Bank suspended business for lack of funds, and was placed in charge of a bank examiner, who required that \$50,000 should be raised and placed in the bank before it could resume business. The stockholders, including one B., the president, thereupon raised this sum, in amounts equal to 50 per cent of their stock, and placed it in the bank. The examiner caused entries to be made on the books indicating that this contribution was a voluntary assessment, subject, after one year, to the liabilities of the bank, and permitted the bank to resume. B., at a meeting of the directors subsequently held, protested against these book entries, but afterwards signed reports in which the \$50,000 was included as surplus. At the time of the advance the bank held two notes of B., and discounted another note of his a few days before the expiration of a year from the advance. Shortly after the expiration of the year the bank again suspended payment. *Held*, that the advance to the bank was a voluntary assessment, and not a loan, and could not be set off by B. in an action against him on the notes by the receiver of the bank. (Broderick v. Brown, 69 Fed. Rep., 497.)
- 12 (Cal., 1894). One in whose name stock of an insolvent national bank stood paid an assessment thereon under a threat by the receiver to sue therefore, though he claimed that he had sold the stock. More funds were collected than were required to pay the creditors of the bank. *Held*, that such payment could not be recovered as having been made under a mistaken belief by the payor that the whole amount would be required to pay the creditors of the bank. (Holt v. Thomas, 38 P., 891; 105 Cal., 273.)
- 13 (N. C. Sup., 1899). A shareholder in a national bank in the process of liquidation can not set off his distributive share in the assets against his liabilities. (First Natl. Bank v. Riggins, 32 S. E., 801.)

*Fraud may not be offset against assessment.*

- 14 (U. S. Sup. Ct., 1901). In such a suit, a defendant stockholder can not offset against the stock assessment damages incident to the fraud of the bank in inducing him to become a shareholder. (Lantry v. Wallace, 182 U. S., 536.)

## ACTIONS TO ENFORCE LIABILITY.

## ACTIONS BY RECEIVER.

## IN GENERAL.

*Enforcement of shareholder's personal liability.*

- 1 (U. S. Sup. Ct., 1869). On a bill filed by a receiver against stockholders under section 50, where bank fails to pay its notes, action by Comptroller must precede institution of suit by receiver and be set forth therein. (Kennedy v. Gibson, 75 U. S. (8 Wall), 498.)
- 2 (U. S. Sup. Ct., 1869). Creditors of the bank are not proper parties to such bill. (Ib.)

*Security for costs.*

- 3 (U. S. C. C., 1898). A receiver of a national bank, bringing suit against stockholders in a circuit court in another jurisdiction, is not exempted by Revised Statutes, section 1001, from being required by the court to give security for costs. (Platt v. Adriance, 90 Fed. Rep., 772.)

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## IN GENERAL—continued.

*When receiver can not bring suit to enforce individual liability of stockholder.*

- 4 (U. S. C. C., 1882). A creditor's bill was filed against a national bank before the passage of the act of Congress of June 30, 1876 (19 Stat. L., 63), and a receiver was appointed who took possession of the property of the bank. An amended bill was filed in the cause, after the passage of that act, to secure the benefits of the act, to which all stockholders were made parties. Subsequently the Comptroller of the Currency appointed a receiver to wind up the affairs of the bank, and this suit was brought by him against one of the stockholders. *Held*, on demurrer to a plea in abatement, which set forth these facts, that the defendant is entitled to judgment on the ground that, as the stockholder's liability can be completely enforced in a suit in equity, the general rule applies that a debtor shall not be vexed by two suits in the same jurisdiction for the same cause of action. (Harvey, Receiver, etc., v. Lord, 10 Fed. Rep., 236.)

*Separate actions allowed.*

- 5 (U. S. Dist. Ct.). Separate actions may be brought to enforce the personal liability of stockholders. (*Stanton v. Wilkeson*, 8 Ben., 357.)

*National banks—Action by receiver to recover assessments—Complaint.*

- 6 (U. S. C. C. A., 1902). A complaint in an action by the receiver of a national bank to recover an assessment from a stockholder sufficiently shows the capital stock of the bank, although not directly alleged, where it alleges that there were 500 shares, of the par value of \$100 each, and that the assessment was made ratably, at \$100 per share, and amounted to \$50,000. (*McClaine v. Rankin*, 119 Fed. Rep., 110; 5 B. C., 269.)

*Same—Notice of assessment—Evidence.*

- 7 (U. S. C. C. A., 1902). The testimony of a witness that in his capacity as receiver of a national bank he made personal demand upon a stockholder for the payment of an assessment, and that the stockholder admitted having received notice thereof, where uncontradicted, sufficiently shows notice and demand to support an action to recover the assessment. (*Ib.*)

*Same—Authority to sue.*

- 8 (U. S. C. C. A., 1902). Specific authority given by the Comptroller to the receiver of a national bank to bring an action against a stockholder to recover an assessment is not withdrawn or affected by a subsequent general authority to compromise or sell all the claims or assets of the bank. (*Ib.*)

*Same—Defenses—Prior action by receiver.*

- 9 (U. S. C. C. A., 1902). An action brought by the receiver of a national bank against a stockholder to enforce a compromise agreement entered into for the settlement of the stockholders' liability for an assessment, but in which the receiver took a voluntary nonsuit, is not a bar to a subsequent action to recover the assessment, the stockholder having failed to carry out the compromise agreement, nor did the receiver's action in commencing such suit create an estoppel against him. (*Ib.*)

*Satisfaction of judgment for personal liability discharges shareholder.*

- 10 (Nebr. Sup., 1900). A receiver has authority to institute proceedings and collect assessments ordered by the Comptroller of the Currency against stockholders of an insolvent national bank on their individual liability, and satisfaction of a judgment obtained in such proceedings satisfies and obliterates the obligation, regardless of the disposition



## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## IN GENERAL—continued.

made of the proceeds of such assessment by the receiver of such national bank. (*Schaberg's Estate v. McDonald*, 83 N. W., 737; 60 Nebr., 493.)

*Action by receiver.*

- 11 (Ohio). Each shareholder of a national banking association is individually liable for its debts to the extent of the amount of his stock at its par value, in addition to the amount invested in the shares held by him, and a receiver appointed to wind up the affairs of such an association that has become insolvent is authorized, under the direction of the Comptroller of the Currency, to enforce the liability of its stockholders, and to collect from each of them the necessary amount, up to the extent of his liability, for the payment of the creditors. (*King et al. v. Armstrong, Receiver*, 34 N. E., 163; 50 Ohio St., 222.)

## ACTIONS AT LAW.

- 1 (U. S. Sup. Ct., 1878). An action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholders can be stated. In such cases the extent of the stockholders' liability is fixed. (*Mills v. Scott*, 99 U. S., 25.)
2. When the full personal liability of shareholders is to be enforced the action must be at law.  
(U. S. Sup. Ct., 1869) *Kennedy v. Gibson*, 75 U. S. (8 Wall.), 498;  
(U. S. Sup. Ct., 1876) *Casey v. Galli*, 94 U. S., 673.
3. When an assessment upon the stockholders is ordered by the Comptroller, a suit at law is the proper remedy to enforce it.  
(U. S. C. C., 1877) *Bailey v. Sawyer*, 4 Dill., U. S., 463; 1 N. B. C., 356;  
(U. S. C. C., 1891) *Young v. Wempe et al.*, 46 Fed. Rep., 354.
- 4 (U. S. C. C., 1877). And it may be at law, though the assessment is not for the full value of the shares; for, since the sum each shareholder must contribute is a certain exact sum, there is no necessity for invoking the aid of a court of equity. (*Bailey v. Sawyer*, 4 Dill., 463; 1 N. B. C., 356.)

*Trusts—Action against trustee—Pleading.*

- 5 (U. S. C. C., 1904). Under the Massachusetts practice a trustee can not be sued at law as such, but the action must be against him as an individual, and his description in the writ and declaration as trustee is surplusage. (*Hampton v. Foster*, 127 Fed. Rep., 468.)

*National banks—Assessment against stockholders—Action against trustee.*

- 6 (U. S. C. C., 1904). Where the question of the liability of a trust estate for an assessment on shares of an insolvent national bank held by the trustee depends upon the power of the trustee, under the terms of the trust, to purchase such shares for the estate, such question can not be determined in an action at law by the bank receiver against the stockholder, though it is alleged that he holds the stock as trustee. (*Ib.*)

## ACTIONS IN EQUITY.

- 1 (U. S. Sup. Ct., 1869). Where less than the whole amount of such stock is sought to be recovered the proceeding may be in equity. In such case an interlocutory decree may be taken for contribution, and the case may stand over for further action of the court until the whole amount of the liability is exhausted. (*Kennedy v. Gibson*, 8 Wall., 498.)

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## ACTIONS IN EQUITY—continued.

- 2 (U. S. Sup. Ct., 1878). Where the amount of shareholder's liability is not fixed, but must be computed on bank's capital stock, assets, and liabilities, a suit in equity is the proper remedy to enforce an assessment. (*Mills v. Scott*, 99 U. S., 25.)
- 3 (U. S. Sup. Ct., 1888). The bill alleging that the married woman is possessed of property in her own right sufficient to pay the assessment and praying for a decree of payment therefrom, and the bill of revivor filed after her death against her husband, praying for relief out of the assets received by him as her legatee, devisee, or executor, the case is one of equitable cognizance. (*Bundy v. Cocke*, 128 U. S., 185.)
- 4 (U. S. C. C., 1896). The bar of a statute of limitations will be enforced, when applicable, in equity as well as at law. (*Thompson v. German Ins. Co. et al.*, 76 Fed. Rep., 892.)
- 5 (U. S. C. C., 1898). Where bank stock was transferred by an executrix to herself individually, and she admits before suit is brought, and again in her answer, that the transfer was without consideration, and is void, such admission does not vacate the transfer, and a bill in equity will lie to determine the liability of the estate on an assessment of the face value of the stock. (*Zimmerman v. Carpenter*, 84 Fed. Rep., 747.)
- 6 (U. S. C. C., 1898). Where, at the hearing, the defendant raises the point that the claimant has a plain, speedy, and adequate remedy at law, the court will not make a decree if there is a plain defect of jurisdiction, but the bill will be construed more liberally than if the point had been raised by demurrer. (Ib.)
- 7 (U. S. C. C. A., 1900). The receiver of an insolvent national bank may maintain a suit in equity to enforce an assessment against stockholders, where such assessment is less than the full amount of their liability; and where the question of law involved is common as to a number of the stockholders, and rests upon substantially the same facts, they may be joined as defendants. (*Bailey v. Tillinghast*, 99 Fed. Rep., 801.)
- 8 (U. S. C. C. A., 1900). To authorize a plaintiff to maintain a suit in equity against a number of persons, it is not essential that there should be a community of interest between them; but where a common question of law arising upon similar facts is involved between the plaintiff and each defendant, equity has jurisdiction on the ground of preventing a multiplicity of suits. (Ib.)

## PARTIES, ALLEGATIONS, EVIDENCE, BURDEN OF PROOF, PRACTICE.

*Parties.*

- 1 (U. S. Sup. Ct., 1882). Bill filed by receiver against transferrer and transferee (where transfer was made to avoid liability), to enforce such liability will lie, where it is for discovery as well as relief, as the transfer would be good between the parties, and only voidable at the election of the complainant. (*Bowden v. Johnson*, 107 U. S., 251.)
- 2 (U. S. Sup. Ct., 1869). Where less than the entire liability of stockholders is sought to be enforced, proceedings may be had in equity and an interlocutory decree may be taken for contribution. Where contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in a suit, and it will be no objection that there are others beyond the jurisdiction of the court who can not for that reason be made codefendants. (*Kennedy v. Gibson*, 1 N. B. C., 17; 75 U. S. (8 Wall.), 498.)

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## PARTIES, ALLEGATIONS, EVIDENCE, BURDEN OF PROOF, PRACTICE—continued.

*Allegations.*

3. It is not essential in an action to enforce the individual liability of the shareholders of an insolvent national banking association to aver and prove that the assessment was necessary, for the decision of the Comptroller on this point is conclusive.  
 (U. S. Sup. Ct., 1869) *Kennedy v. Gibson*, 75 U. S. (8 Wall.), 498;  
 (U. S. Sup. Ct., 1876) *Casey v. Galli*, 94 U. S., 673;  
 (U. S. C. C., 1891) *Young v. Wempe et al.*, 46 Fed. Rep., 354;  
 (U. S. Dist. C.) *Strong v. Southworth*, 8 Ben., 331.
- 4 (U. S. C. C., 1895). In an action by the receiver of a national bank to enforce the individual liability of a stockholder, an allegation in the complaint that on a given date the Comptroller, having ascertained and determined that the assets, property, and credits of the bank were insufficient to pay its debts and liabilities, and, as provided by the act of Congress, made an assessment and requisition on the shareholders of the said bank of a given sum upon each share held and owned by them, respectively, at the time of its default, and directed the receiver to take all necessary steps to enforce the liability, is sufficient. (*Kennedy v. Gibson*, 8 Wall., 498, distinguished; *Nead v. Wall*, 70 Fed. Rep., 806.)
- 5 (Cal., 1896). The complaint, in an action by the receiver of an insolvent national bank to enforce an assessment on the shareholders, made by the Comptroller of the Currency, need not aver that there was a necessity therefor, or that the Comptroller determined that there was such necessity, though the law provides that the Comptroller may enforce the individual liability of the stockholders, if necessary to pay the debts of the bank. It is enough that the complaint alleges that the Comptroller made the assessment and directed its enforcement. (*O'Connor v. Witherby*, 44 P., 227; 111 Cal., 523.)
- 6 (Cal., 1896). The allegation of the complaint, in an action for an assessment on shareholders, in a bank, that "defendant, though demanded, has failed and refused to pay said assessment, or any part thereof," is a sufficient averment as against a general demurrer of nonpayment at the time action was commenced. (*Ib.*)
- 7 (Mass., 1896). Where the statutory liability of a stockholder to corporate creditors is, by statute, declared to be directly to the creditors, an averment in a declaration to enforce such liability that the corporation is in the hands of a receiver is immaterial. (*Hancock National Bank v. Ellis*, 44 N. E., 349; 166 Mass., 414.)
- 8 (Mass., 1896). The declaration in an action to enforce the liability of a stockholder of a foreign corporation which averred that under the statute of the foreign State, as interpreted by the decisions of the court of last resort of that State, defendant's liability as stockholder was contractual, and arose upon the subscription made by him to the capital stock, and that in subscribing he guaranteed payment to the creditors of the corporation of an amount equal to the par value of the stock held by him, which should be payable to the judgment creditors of the corporation who first pursued their remedy under the statute; and that an action to enforce that liability was transitory, and could not be brought in any court of general jurisdiction in the State where personal service could be made upon the stockholder—stated a cause of action of which the courts of Massachusetts had jurisdiction. (*Ib.*)

*Evidence.*

- 9 (U. S. C. C. A., 1897). Upon the trial of a suit brought by the receiver of an insolvent national bank to collect an assessment from one who had transferred his stock, a letter written by the defendant to a bank

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## PARTIES, ALLEGATIONS, EVIDENCE, BURDEN OF PROOF, PRACTICE—continued.

- examiner, in reply to an inquiry about the bank, in which defendant admits his transfer of his stock when the bank was embarrassed, is not a privileged communication, though the bank examiner's letter, to which it is a reply, is marked "Confidential." (*Cox v. Montague*, 78 Fed. Rep., 845.)
- 10 (U. S. Dist. Ct., 1900). In an action by the receiver of a national bank to recover an assessment on stock alleged to be held by the defendant as executrix, a copy of entries in the stock book of the bank showing the issuance of a certificate of stock to the estate of the defendant's testator, identified as a true copy by the deposition of the former cashier, who testified with the book before him, is admissible against the defendant to prove such entries. (*Brown v. Ellis*, 103 Fed. Rep., 843.)
  - 11 (U. S. Dist. Ct., 1900). As between the shareholders of a national banking association, the books of the bank are public records, and the entries therein are admissible against them as evidence of the facts they show. (*Ib.*)
  - 12 (U. S. Dist. Ct., 1900). The original order of the Comptroller of the Currency levying an assessment on the shares of a national bank, over his official signature and seal, proves itself, and fixes the liability of the shareholders from its date, no demand being necessary. (*Ib.*)
  - 13 (U. S. Dist. Ct., 1900). Depositions taken under a commission issued to "A. C. Strong," a notary public of a certain county, are not inadmissible because they were taken and certified by "Alfred C. Strong" as a notary public of such county, who is shown to be the same person. (*Ib.*)
  - 14 (U. S. Dist. Ct., 1900). Where depositions are taken for use in a Federal court under the provisions of Revised Statutes, 863-865, upon a commission issued to a notary public, it is not essential that he should attach his official seal to his certificate. (*Ib.*)
  - 15 (U. S. Dist. Ct., 1900). Where, in the taking of depositions for use in a Federal court under the provisions of Revised Statutes, 863-865, both parties were present by counsel, and the testimony on both direct and cross examination was taken in shorthand and reduced to writing by the stenographer in the presence of the magistrate, witnesses, and counsel, a failure to object to such proceedings, either at the time of taking or when the depositions were offered in evidence, was a waiver of the right to have them excluded because the testimony was not reduced to writing by either the magistrate or the witnesses, as required by section 864. (*Ib.*)

*Burden of proof.*

- 16 (U. S. Sup. Ct., 1877). Where the name of an individual appears on the stock book of a corporation as a stockholder the presumption is that he is the owner of the stock; and in an action against him as stockholder the burden of rebutting that presumption is cast upon the defendant. A receipt of a dividend upon the shares standing upon the book of the company in the name of the defendant is also evidence of his being a stockholder. (*Turnbull v. Payson*, 95 U. S., 418.)
- 17 (U. S. C. C. A., 1900). Defendant held shares of stock in a national bank as collateral security. The bank was subsequently consolidated with another bank, and stock of the latter was issued in lieu of stock of the former. Defendant surrendered the shares it held, and caused stock in the consolidated bank to be issued in lieu thereof in the name of an employee, but continued to hold the same as security for the original debt. *Held*, in an action by the receiver of the consolidated bank to recover an assessment from the defendant, in which he

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## PARTIES, ALLEGATIONS, EVIDENCE, BURDEN OF PROOF, PRACTICE—continued.

alleged that defendant had purchased and become the owner of the stock, on the theory that its having caused the substituted stock to be issued amounted to a conversion of the collateral, that the burden of proof rested on the plaintiff to prove that the exchange was made without the consent of the pledgor. (*Wilson v. Merchants' Loan and Trust Co. of Chicago, Ill.*, 98 Fed. Rep., 688.)

- 18 (U. S. C. C., 1900). A pledgee of national-bank stock can be held liable for an assessment thereon only on the ground of estoppel, and the burden of showing such estoppel rests upon the receiver suing to recover such assessment. (*Tourtlot v. Stolteben*, 101 Fed. Rep., 362.)
- 19 (Mich. Sup., 1899). In an action to enforce such liability, the burden is upon the receiver of the bank to show that a transfer of stock was made by the stockholder for the fraudulent purpose of avoiding liability as such stockholder. (*Foster v. Broas, Foster v. Row*, 2 Banking Cases, 700; 79 N. W., 696; 120 Mich., 1.)

*Practice.*

- 20 (U. S. C. C. A., 1904). Where it had been previously determined in a probate proceeding by the receiver of an insolvent national bank to establish a claim for an assessment levied on stock against decedent's estate that she was the owner of the stock, the parties to a subsequent action against decedent's distributees by the receiver's successor to recover a subsequent assessment being in privity, defendants were estopped to relitigate the question of decedent's ownership, though the cause of action in the two proceedings was not the same. (*Rankin v. City of Big Rapids et al.*, 133 Fed. Rep., 670.)
- 21 (U. S. C. C., 1894). An action was brought against the executors of an estate to establish its liability for an assessment on certain shares of national-bank stock. The estate was at the time in possession of an Iowa probate court for purposes of administration, for which reason the Federal court could not enforce the liability, if adjudged to exist. Defendant set up the limitations contained in the Iowa statute (Code, sec. 2421) regulating the settlement of estates. *Held*, that the Federal court would not pass upon the question whether this provision debarred complainant from sharing in the estate, for, as the claim established in the Federal court must be presented for allowance in the probate proceedings, the better practice was to remit the question to the probate court. (*Wickham v. Hull et al.*, 60 Fed. Rep., 326.)
- 22 (U. S. C. C. A., 1900). An assignment of error based on the refusal of an instruction submitting to the jury a question of fraudulent intent in including in a mortgage certain items of indebtedness of a third party to the mortgagee raises no question which can be considered, where the bill of exceptions does not set out the evidence, but merely gives its substance, and contains a recital that there was evidence tending to show that such indebtedness had previously been assumed by the mortgagor, and that there was no evidence tending to show that its inclusion was with any fraudulent purpose. (*Carson et al. v. Commercial Nat. Bank of Independence, Kans.*, et al., 104 Fed. Rep., 733).
- 23 (Nebr. Sup., 1900). Where, during the proceedings of the trial of a case in the district court, the plaintiff, the receiver of an insolvent national bank, dies, and a successor is appointed, and such facts are suggested to the court, supported by affidavit, with a request for the substitution of the successor, and defendant files objections to such substitution: *Held*, that the issuance of summons or conditional order of revivor was thereby waived, and that, upon the hearing of such application and objections, a positive order substituting such successor as plaintiff in the action was proper, no sufficient reason

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## PARTIES, ALLEGATIONS, EVIDENCE, BURDEN OF PROOF, PRACTICE—continued.

why the same should not be done having been shown on the objections raised. (*Schaberg's Estate v. McDonald*, 83 N. W., 737; 60 Nebr., 493.)

## INSUFFICIENT DEFENSES.

*Shareholder not permitted to deny existence of corporation.*

- 1 (U. S. Sup. Ct., 1876). A shareholder in a national bank is not permitted to deny the existence or legal validity of such corporation. (*Casey v. Galli*, 94 U. S., 673.)

*Shareholder can not set up as a defense against his liability the fact that he was induced to purchase said stock by fraud.*

- 2 (U. S. Sup. Ct., 1901). Fraudulent representations by which a person is induced to become a stockholder of a national bank constitute no defense in an action at law by a receiver of the bank to enforce the statutory liability of the stockholders, as the defense is of an equitable nature and must be asserted, if at all, in equity. (*Lantry v. Wallace*, 182, U. S., 536.)
- 3 (U. S. Sup. Ct., 1901). The illegality of a purchase by a national bank of its own stock does not relieve one who subsequently buys it from the bank from liability as stockholder. (*Ib.*)
- 4 (U. S. C. C., 1898). A stockholder by purchase in a national bank which has conducted business as such for six years can not defend against an action by a receiver to recover an assessment on the ground that the original capital stock of the bank was never paid in. (*Wallace v. Hood*, 89 Fed. Rep., 11.)
- 5 (U. S. C. C., 1898). One induced by the fraud of a national bank to purchase stock therein, which the bank in reality owned, can not make an effectual tender of rescission which will support an action at law to recover the purchase price after the bank has passed into the hands of a receiver. (*Ib.*)
- 6 (U. S. C. C., 1898). In an action by the receiver of a national bank to enforce an assessment against a stockholder, the latter can not maintain a cross petition to recover the purchase price paid for his stock on the ground of the fraud of the bank inducing his purchase. (*Ib.*)
- 7 (U. S. C. C., 1898). The statutory inhibition against the purchase by a national bank of its own stock does not render stock so purchased and held in the name of a third person void; and a subsequent purchaser for value acquires a good title. (*Ib.*)
- 8 (U. S. C. C., 1898). One induced to purchase stock of a national bank by fraudulent representations, who retains it until a receiver is appointed, can only escape liability for an assessment against stockholders by affirmatively disclosing in his answer such a state of facts as would make it apparent that the equity of the creditors is inferior to that of the defrauded stockholder. (*Ib.*)
- 9 (U. S. C. C., 1900). A decree of a State court, rescinding for fraud a contract for the purchase of stock in a national bank, may be pleaded in the answer of the purchaser, in an action against him by the receiver of the bank to enforce an assessment on the stock, as conclusive on the question of fraud, where the receiver was a party to the decree, although it could not be pleaded as a bar to the action. (*Stufflebeam v. De Lashmutt*, 101 Fed. Rep., 367.)
- 10 (U. S. C. C., 1900). In an action by the receiver of a national bank to recover an assessment from defendant as a stockholder, an answer setting up facts showing that defendant's purchase of the stock was induced by fraud, *held*, not demurrable. (*Ib.*)
- 11 (*Mich. Sup.*, 1899). A stockholder, after having purchased his stock and registered it, and permitted depositors to rely upon his ownership,

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## INSUFFICIENT DEFENSES—continued.

can not repudiate his liability under such statute on the ground that he was induced to purchase the stock through fraudulent representations made as to its value by the officers of the bank. (*Foster v. Broas et al.*, *Foster v. Row*, 120 Mich., 1; 79 N. W., 696; 2 Banking Cases, 700.)

- 12 (Mich. Sup., 1899). The mere fact that his stock was never transferred to him on the books of the bank is no defense in an action against a transferee of stock to enforce such liability. (Ib.)

*In Wisconsin*—The fact that shareholder was induced by fraud to subscribe for stock in State bank no defense.

- 13 (Wis. Sup., 1901). Revised Statutes, 1898, section 2024, subsection 47, provides that stockholders in every banking corporation organized under this act shall be individually responsible to the amount of their respective shares for all its indebtedness and liabilities of every kind. S., the promoter of the bank, secured the signatures of W. R. and R. R. to the articles of incorporation, with the understanding that they were not to be liable unless the signature of M. R. should be secured, and his consent that the firm of R.'s sons should take 25 shares. M. R. refused to sign the articles, and S., after being informed of such refusal, and without the knowledge of W. R. and R. R., filed the articles of incorporation with their signatures, and subsequently tendered 25 shares to the firm, which were refused. In all the reports of the bank to the State treasurer W. R. and R. R. were returned as stockholders. *Held*, that W. R. and R. R. became stockholders in the bank, and hence were individually liable under the statute, since it would be against public policy to allow them to impeach the record as against the intervening rights of creditors by showing the conditional signature of the articles. (*Rehbein et al. v. Rahr et al.*, 85 N. W. Rep., 315; 109 Wis., 136.)

*Increase of capital stock*—When failure to pay in the whole amount no defense against liability on the amount paid in.

- 14 (U. S. Sup. Ct., 1901). Section 5142 of the Revised Statutes of the United States, providing for the increase of the capital stock of a national bank, and declaring that no increase of capital stock shall be valid until the whole amount of the increase is paid in and until the Comptroller of the Currency shall certify that the amount of the proposed increase has been duly paid in as part of the capital of such association, does not make void a subscription or certificate of stock based upon capital stock actually paid in, simply because the whole amount of any proposed or authorized increase has not in fact been paid into the bank; certainly the statute should not be so applied in behalf of a person sought to be made liable as shareholder, when, as in the present case, he held at the time the bank suspended and was put into the hands of a receiver a certificate of the shares subscribed for by him, enjoyed, by receiving and retaining dividends, the rights of a shareholder, and appeared as a shareholder upon the books of the bank, which were open to inspection, as of right, by creditors. (*Scott v. De Weese*, 181 U. S., 202.)
- 15 (U. S. Sup. Ct., 1901). As between the bank and the defendant, the latter, having paid the amount of his subscription for shares in the proposed increase of capital, was entitled to all the rights of a shareholder, and therefore, as between himself and the creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him. (Ib.)
- 16 (U. S. Sup. Ct., 1901). That the bank, after obtaining authority to increase its capital, issued certificates of stock without the knowledge or approval of the Comptroller and proceeded to do business upon the basis of such increase before the whole amount of the proposed

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## INSUFFICIENT DEFENSES—continued.

increase of capital had been paid in, was a matter between it and the Government under whose laws it was organized, and did not render void subscriptions or certificates of stock based upon capital actually paid in nor have the effect to relieve a shareholder who became such by paying into the bank the amount subscribed by him from the individual liability imposed by section 5151. (Ib.)

- 17 (U. S. Sup. Ct., 1901). Upon the failure of a national bank the rights of creditors attach under section 5151, and a shareholder who was such when the failure occurred can not escape the individual liability prescribed by that section upon the ground that the bank issued a certificate of stock before, strictly speaking, it had authority to do so. (Ib.)

- 18 (U. S. Sup. Ct., 1901). If a subscriber to the stock of a national bank becomes a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder within the meaning of section 5151 if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position. (Ib.)

- 19 (U. S. Sup. Ct., 1890). Defendant subscribed for new stock in the reorganization of a bank, and received a certificate on the basis of a total subscription of \$500,000. The actual increase was \$461,300. He protested against the same, and refused to vote on the stock, but retained his certificate until the bank went into the hands of a receiver several months later. *Held*, that he was liable to the receiver on his subscription, and it was too late to claim that the increase as to him was invalid. (*Aspinwall v. Butler*, 133 U. S., 595.)

*Cashier presumed to know stock stood in his name on books, although certificate had not been issued him.*

- 20 (U. S. Sup. Ct., 1891). A director who is also vice-president and cashier of a national bank can not shield himself from liability as a stockholder and from what he had received from a dividend fraudulently declared by alleging ignorance of what appears by the books of which he has charge. (*Finn v. Brown*, 142 U. S., 56.)

- 21 (U. S. Sup. Ct., 1891). Where a person receives from a bank a dividend on stock which he denies owning, he should restore the dividend to the bank. He does not free himself from liability for it by giving his check on the bank for the amount to alleged true owner. (Ib.)

*The fact subscriber to new stock was given old stock in place of new no defense.*

- 22 (U. S. C. C. A., 1900). A subscriber to an increased issue of stock of a national bank who was given original stock instead, but who retained the same without objection for three years, and until the bank had become insolvent, *held*, precluded from escaping liability as a stockholder on the ground that he never subscribed for such stock. (*Bailey v. Tillinghast*, 99 Fed. Rep., 801.)

- 23 (U. S. C. C. A., 1900). It is incompatible with the policy and purpose of the national-banking laws to permit irregularities, or even fraudulent practices, in the organization or management of a bank created thereunder, to invalidate its action and give ground for a stockholder to repudiate his obligations to the public. (Ib.)

- 24 (U. S. C. C. A., 1899). Subscribers to the capital stock of a national bank previously organized and carrying on business, who accepted certificates of stock representing a portion of the original capital stock, obtained by the bank in some manner from the former holders, are estopped, after the lapse of five years, during which they retained the stock, received two dividends, and paid one assessment thereon,



## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## INSUFFICIENT DEFENSES—continued.

to deny that they are stockholders, in a suit by the receiver, on the bank's insolvency, to collect a further assessment, on the ground that they supposed they were purchasing a part of an issue of increased stock which the bank had voted to issue, but the issuance of which had not then been authorized by the Comptroller. (*Rand v. Columbia National Bank*, 94 Fed. Rep., 349; *Same v. Tillinghast*, ib.)

*Contra.*

25 (U. S. C. C., 1890). One who subscribes and pays for a specified number of shares of a "proposed increase" of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a "shareholder" within the meaning of Revised Statutes, section 5151, imposing individual liability on the shareholders for the debts of national banks. (*Stephens v. Follett et al.*, 43 Fed. Rep., 842.)

26 (U. S. C. C., 1890). The fact that the subscriber for the new shares received a dividend on the old shares so transferred to him does not estop him from denying his liability as a shareholder, where such dividend was received in the belief that it was paid to him by virtue of his subscription to the new stock. (Ib.)

*Overissues*—Shareholders who received new certificates for stock purchased can not claim not to be liable thereon because the old certificates were sold instead of canceled, thereby creating an overissue.

27 (U. S. C. C. A., 1896). Stock of a bank was purchased by defendants, of the president thereof, at a time when there was no overissue, and when the amount purchased was credited to him on the books. At the time, or shortly afterwards, the stock, by his direction, was transferred from his account to theirs on the stock journal and stock ledger and new certificates were issued to them. Thereafter they were treated by the bank as the lawful owners of the stock and were allowed to vote the same and receive the dividends thereon. The bank having failed, suit was brought to collect an assessment made against defendants as shareholders. *Held*, that they were estopped from claiming that they were not stockholders, although the president neglected to cancel the old certificates, and afterwards hypothesized part of them, thereby creating an overissue. (*Burt v. Bailey et al.*, 73 Fed. Rep., 693.)

*Former judgment bars only matters litigated.*

28 (U. S. C. C., 1897). In an action by a receiver to recover an assessment on certain shares of a national bank, defendant pleaded a prior judgment dismissing a bill brought to charge her father's estate with the same assessment, to which suit she was also a party. *Held*, that the causes of action were different, that in the earlier suit being the alleged ownership of the shares by the father at the date of the bank's failure and that in the latter the alleged ownership by the daughter of the same shares at the same date; and that, therefore, the former suit operated as an estoppel only as to the matters actually litigated and determined. (*Ricaud v. Tysen*, 78 Fed. Rep., 561.)

*Receiver, unlawful disposing of claim for assessment by, no defense against assessment.*

29 (Nebr. Sup., 1900). It is no defense to a stockholder in an insolvent national bank, who is sued by the receiver on his individual liability upon an assessment ordered by the Comptroller of the Currency, to say that the receiver has unlawfully disposed of such claim, and that the creditors of such bank will not receive of the proceeds thereof as much as they are entitled to. (*Schaberg's Estate v. McDonald*, 83 N. W., 737; 60 Nebr., 493.)

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## JURISDICTION.

- 1 (U. S. C. C., 1898). An assessment against the estate of an owner of national-bank stock, in the hands of his executrix, is enforceable in the Federal courts, though proceedings for settlement of the estate are pending in the probate court of Vermont. (*Brown v. Ellis*, 86 Fed. Rep., 357.)
- 2 (U. S. C. C., 1896). The circuit court has jurisdiction of an action to ascertain or fix the liability upon shares of an insolvent national bank which are alleged to have been transferred with a fraudulent intent to escape such liability when the amount of the assessment exceeds \$2,000, exclusive of interest and costs. (*Thompson v. German Ins. Co. et al.*, 76 Fed. Rep., 892.)
- 3 (U. S. C. C., 1898). When an executor refuses to recognize, as a claim against decedent's estate, an assessment by the Comptroller of the Currency upon national-bank stock belonging to the deceased, a Federal court will assume jurisdiction of an action against the executor to determine the liability, although the estate is in the course of administration in the probate court. (*Zimmerman v. Carpenter*, 84 Fed. Rep., 747.)
- 4 (U. S. Dist. Ct., 1890). The United States district court has jurisdiction of an action at law brought by the receiver of a national bank to recover an assessment made upon a stockholder, and the action may be maintained in such event against the executor of a deceased stockholder. (*Stephens v. Bernays*, 41 Fed. Rep., 401.)
- 5 (U. S. C. C., 1898). Circuit courts have jurisdiction of actions by receivers of national banks to collect assessments made by the Comptroller, without regard to the amount involved. (*Brown v. Smith*, 88 Fed. Rep., 565.)
- 6 (U. S. C. C. A., 1900). The receiver of an insolvent national bank may maintain a suit in equity to enforce an assessment against stockholders, where such assessment is less than the full amount of their liability; and, where there is a common question of law involved as to a number of the stockholders, they may be joined as defendants. (*Bailey v. Tillinghast*, 99 Fed. Rep., 801.)
- 7 (Vt., 1889). As by Revised Statutes United States, section 5242, an attachment issued before final judgment from a State court against a national bank is prohibited, such an attachment does not operate as notice to the absent defendant so as to give the court jurisdiction of the party or subject-matter. (*Safford v. First National Bank of Plattsburgh*, 17 A., 748; 61 Vt., 373.)

## LIMITATIONS.

1. The liability of the stockholders of a national bank to an assessment on the bank's insolvency is so far conditioned upon the sufficiency of the general assets to pay its indebtedness that the receiver is only authorized to proceed against a stockholder after the Comptroller has determined the necessity of the assessment and the amount required; hence the statute of limitations does not commence to run against an action to enforce the stockholder's liability until such determination has been made.
  - <sup>a</sup>(U. S. Sup. Ct., 1889) *Hawkins v. Glenn*, 131 U. S., 319;
  - <sup>a</sup>(U. S. Sup. Ct., 1890) *Glenn v. Liggett*, 135 U. S., 533;
  - <sup>a</sup>(U. S. Sup. Ct., 1892) *Glenn v. Marbury*, 145 U. S., 499;
  - (U. S. C. C. A., 1901) *De Weese v. Smith et al.*, 106 Fed. Rep., 438;
  - (U. S. C. C., 1896) *Thompson v. German Insurance Co.*, 76 Fed. Rep., 892;

<sup>a</sup> Not national-bank cases, but sustain the principle.

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## LIMITATIONS—continued.

- (Mo.) *Tapley v. McPike*, 50 Mo., 589;  
(Ohio, 1893) *King v. Armstrong*, 34 N. E., 163; 50 Ohio St., 222.
- 2 (U. S. Sup. Ct., 1902). A demand which starts the running of the statute of limitations against the right of a receiver of a national bank to enforce the statutory liability of its shareholders is shown by the allegations of the bill filed by the receiver to enforce such liability, that on a specified date the Comptroller of the Currency made an assessment upon the shareholders of such bank and "did thereby make demand upon each and every share of the capital stock of said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders. (*McDonald, receiver, v. Thompson*, 4 Banking Cases, 209; 22 Sup. Ct. Rep., 297; 184 U. S., 71.)
- 3 (U. S. Sup. Ct., 1905). In the absence of any provision of the act of Congress creating the liability of stockholders of national banks, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable. (*McClaine v. Rankin*, 197 U. S., 154.)
- 4 (U. S. Sup. Ct., 1905). Although a statutory liability may be contractual, or quasi-contractual, in its nature, an action given by statute is not necessarily to be regarded as brought on simple contract or breach of simple contract. (Ib.)
- 5 (U. S. Sup. Ct., 1905). The liability of stockholders of national banks is conditional, and the right to sue does not obtain until the Comptroller of the Currency has acted; his order is the basis of the suit, and the statute of limitations does not commence to run until assessment made, and then it runs as against an action to enforce the statutory liability and not an action for breach of contract. (Ib.)
6. A suit brought in the United States courts by a receiver against a stockholder to recover an assessment is governed, in the absence of any special provision by Congress, by the State statute of limitations.  
(U. S. C. C., 1879) *Price v. Yates*, 2 N. B. C., 204; 19 Alb. L. J., 295;  
(U. S. C. C., 1890) *Butler v. Poole*, 44 Fed. Rep., 586.
- 7 (U. S. C. C., 1899). No limit of time having been prescribed by the Federal statutes within which an action must be brought to enforce an assessment against a stockholder in an insolvent national bank, such an action is governed as to limitation by the statute of the State where it is brought, by virtue of Revised Statutes, section 721. (*Aldrich v. Skinner*, 98 Fed. Rep., 345.)
- 8 (U. S. C. C., 1899). A right of action by the receiver of an insolvent national bank against a stockholder to recover an assessment does not arise until the necessity for the assessment has been determined and the assessment made by the Comptroller; hence limitation runs against such an action only from that time. (*Aldrich v. Yates*, C. C., 95 Fed. Rep., 78.)
- 9 (U. S. C. C., 1879). In an action by the receiver of a national bank to enforce the liability of a shareholder, it appeared that the date of the defendant's subscription to the stock was prior to May, 1866, when the receiver was appointed; that the Comptroller of the Currency decided on the 28th of June, 1876, that the enforcement of this liability to its full extent was necessary, and instructed the receiver accordingly, and that this action was thereupon brought. *Held*, that although such decision and order of the Comptroller were necessary preliminaries to a suit against the shareholder, yet, having been delayed without sufficient apparent reason for more than six years from the date of the subscription, the statute of limitations was a bar to the action, the State courts having decided that an act neces-

## SHAREHOLDERS—Continued.

## ACTIONS TO ENFORCE LIABILITY—Continued.

## ACTIONS BY RECEIVER—continued.

## LIMITATIONS—continued.

sarily preliminary to the commencement of a suit upon a contract must be done within six years, unless sufficient reason for the delay is shown. (*Price, receiver, v. Yates*, 19 Alb. L. J., 295; 2 N. B. C., 204.)

*In California.*

- 10 (Cal. Sup., 1899). A statute of California provides that actions to recover deposits shall be brought within three years "after the liability was created." *Held*, that the day on which a deposit in such bank was made should be excluded in determining whether an action to enforce the liability of the bank's stockholders on account of such deposit was barred by the statute. (*Dingley v. McDonald et al.*, 2 Banking Cases, 153; 124 Cal., 90.)

*In Kentucky.*

- 11 (Ky. App., 1901). The rendition of a judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of an assessment on stockholders to pay debts, on which execution was directed to issue against the estate of the ward, even if construed as a personal judgment, if obtained by fraud or rendered without service of process, was equivalent to no judgment, and the statute of limitations would apply. (*Clark v. Ogilvie*, 63 S. W., 429.)
- 12 (Ky. App., 1901). The rendition of a judgment in favor of the receiver of an insolvent national bank against a guardian for the amount of the assessment on stockholders to pay debts, on which execution was directed to issue against the estate of the ward, did not stop the running of the statute of limitations in favor of the ward, even if they were personally liable. (Ib.)

*In Nebraska.*

- 13 (U. S. Sup. Ct., 1902). An action brought by a receiver of a national bank under United States Revised Statutes, section 5234, to enforce the individual liability of a shareholder prescribed by section 5151 is not an action upon a "contract or promise in writing" within the meaning of the Nebraska statute of limitations, but is governed by the provisions of that statute requiring actions "upon a contract not in writing, express or implied," or "upon a liability created by statute," to be begun within four years. (*McDonald, Receiver, etc., v. Thompson*, 22 Sup. Ct. Rep., 297, 1902; 4 Banking Cases, 209; 184 U. S., 71.)
- 14 (Nebr. Sup., 1900). A claim against the estate of a deceased person must be presented for examination and allowance to the probate judge or commissioners appointed for that purpose within the time allowed by statute, as fixed by order of the probate court. (*Scha-berg's estate v. McDonald*, 83 N. W., 737; 60 Nebr., 493.)
- 15 (Nebr. Sup., 1900). The failure to exhibit a certain claim within the time limited by the court for that purpose forever bars such claim against such estate, either as a demand or as being used as a set-off in any action whatever. (Ib.)

*In Washington.*

- 16 (U. S. C. C. A., 1901). If a stockholder in a national bank is a resident of Washington, and the bank is located there, a suit to enforce his personal liability is governed by Ballinger's Annotated Codes and Statutes, section 4800, subsection 3, which provides that an action on a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, may be commenced within three years after the cause of action shall have accrued. (*Aldrich v. McClaine*, 106 Fed. Rep., 791.)

## SHAREHOLDERS—Continued.

## ACTIONS BY CREDITORS.

*Creditor must seek remedy through Comptroller.*

- 1 (U. S. Sup. Ct., 1869). The creditors of an insolvent association must seek their remedy through the Comptroller, in the mode prescribed by the statute; they can not proceed directly in their own names against stockholders or the debtors of the bank. (*Kennedy v. Gibson*, 75 U. S.; 8 Wall., 498.)

*Creditor's only action against stockholders is under act of June 30, 1876; jurisdiction, practice.*

- 2 (U. S. C. C. A., 1902). Where a national bank goes into voluntary liquidation, the only authorized procedure for the enforcement of the individual liability of its stockholders is that prescribed by act of June 30, 1876 (19 Stat. L., 63), by a suit in equity in the nature of a creditor's suit brought in behalf of all creditors in a court for the district in which the bank is located, in which the necessity and extent of the ratable enforcement of the stockholders' liability shall be determined. Such suit should be against the bank and all its stockholders, and, in case ancillary proceedings should be necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay creditors, such suits should be authorized by the courts of original jurisdiction, and brought by a receiver or by other person appointed by such court. (*Williamson et al. v. American Bank et al.*, 115 Fed. Rep., 793; 4 Banking Cases, 699.)

*Action in equity by one creditor for all, complaint, amendment.*

- 3 (U. S. Sup. Ct., 1887). Under the original act respecting national banks, and before the act of June 30, 1876, a court of equity had jurisdiction of suit to prevent or redress maladministration or fraud against creditors, in voluntary liquidation of such bank, whether contemplated or executed; and such suit by one creditor must be for all. (*Richmond v. Irons*, 121 U. S., 27.)
- 4 (U. S. C. C., 1883). The bill contemplated by the second section of the act of June 30, 1876, to enforce the individual liability of stockholders in a national banking association that has gone into liquidation, need not purport expressly on its face to be filed by the complainant on behalf of himself and all other creditors, for the law would give it that effect and the court would so treat it; but, if this was necessary, the bill might be amended in that respect by leave of the court. (*Irons, Ex'r, etc., et al. v. Manufacturers' National Bank of Chicago et al.*, 17 Fed. Rep., 308, affirmed in *Richmond v. Irons*, 121 U. S., 27.)
- 5 (U. S. C. C., 1883). The manifest intention of the national banking act is a distribution of its assets, in case a bank becomes insolvent, equally among all the unsecured creditors, and the diligence of a creditor who files a creditor's bill can give him no greater rights than are given any other creditor to share in the distribution of the assets, and a prayer in the bill that such creditor be given priority over other creditors will not be granted. (Ib.)
- 6 (U. S. C. C., 1883). Where the original bill filed before the passage of the act of June 30, 1876, was amended after the passage of that act so as to make the individual shareholders defendants, and subject them to liability, such bill will not be considered on that account multifarious. (Ib.)
- 7 (U. S. C. C., 1883). Where it is admitted by the defendants that they were shareholders in a national bank, but the number of shares respectively held by them is not admitted, the names of the shareholders and the number of shares held by each, as shown by the stock ledger and stubs of the stock certificates and the dividend sheets of the bank on which they respectively drew the last dividends, will be prima facie proof of the number of shares held, and, unless rebutted, sufficient. (Ib.)

## SHAREHOLDERS—Continued.

## ACTIONS BY CREDITORS—Continued.

*Creditor may sue for both individual liability and claim.*

- 8 (U. S. Sup. Ct., 1881). A national bank in voluntary liquidation may still sue and be sued by its name for the purpose of closing its business, and a creditor may maintain a suit upon a disputed claim, although he has filed a bill under the act of June 30, 1876, section 2, to enforce the individual liability of shareholders. (*National Bank v. Insurance Company*, 104 U. S., 54; 3 N. B. C., 20.)

*Intervention.*

- 9 (U. S. C. C. A., 1898). A judgment creditor may intervene after a creditor's bill has been properly filed in a Federal court, although his judgment is for less than \$2,000. (*National Bank of Commerce in Denver v. Allen et al.*, 1 Banking Cases, 53.)

*Parties.*

- 10 (U. S. C. C. A., 1898). To a bill by a creditor of a corporation averring its insolvency and demanding the appointment of a receiver, an accounting, and the enforcement of the individual liability of the stockholders, the corporation is a necessary party defendant. (*Elkhart National Bank, of Elkhart, Ind., v. Northwestern Guaranty Loan Company, of Minneapolis, Minn., et al.*, 87 Fed. Rep., 252.)
- 11 (Ill.). In an action by a depositor in an insolvent bank against the stockholders to recover the balance due him at the time of the suspension of the bank, it is not necessary to join as defendants persons who signed the articles of incorporation but have since transferred their stock, though such transfer was not made in the manner provided by the articles of incorporation. (*Wadsworth v. Hocking*, 61 Ill. App., 156; *Same v. Duncan*, ib.; *Same v. Laurie*, ib.)
- 12 (Ill.). Where a person holds stock in a banking association as trustee, he is a proper party defendant, to the exclusion of his beneficiary, in an action brought by a depositor against the stockholders to recover the balance due him at the time of the suspension of the bank. (Ib.)

*Actions by creditors of State corporation under Colorado statute.*

- 13 (Colo. Sup., 1898). The constitutionality of a statute can not be questioned for the first time on appeal. (*Zang et al. v. Wyant et al.*, 1 Banking Cases, 349; 25 Colo., 551.)
- 14 (Colo. Sup., 1898). The additional liability of stockholders imposed by the statute of Colorado providing that the shareholders, in banks, etc., shall be held individually responsible for debts, contracts, and engagements of such associations in double the amount of the par value of the stock owned by them, respectively, constitutes a fund for the benefit of all the creditors, which may be pursued in equity for the common benefit by or for all; and an assignee whose trust relates only to the corporate assets acquires no right to enforce such statutory obligation. (Ib.)
- 15 (Colo. Sup., 1898). Where an insolvent corporation has made an assignment, its creditors are not required to wait the collection of doubtful claims before enforcing the stockholders' liability under such statute. (Ib.)

*Action by creditors under Wisconsin statute.*

- 16 (Wis. Sup., 1900). Section 1755, Revised Statutes of Wisconsin, relating to the liability of stockholders of a corporation to its directors, can be invoked only by creditors existing at the time of the commission of the act upon which the liability depends and to the extent the capital stock is diminished by such violation. (*Killen v. State Bank of Manitowoc et al.*, 2 Banking Cases, 342.)

## SIGNATURE AND SEAL.

*Signature and seal.*

1. In the absence of charter or statutory requirements to the contrary, a corporation may make a contract, through its authorized agents, without affixing its corporate seal.  
 (U. S. Sup. Ct., 1881) *Gottfried v. Miller*, 104 U. S., 521;  
 (U. S. Sup. Ct., 1823) *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.), 338;  
 (U. S. Sup. Ct., 1840) *Bank of Metropolis, of Washington, D. C., v. Gutschlick*, 14 Pet. (U. S.), 19;  
 (U. S. Sup. Ct., 1813) *Columbia Bank v. Patterson*, 7 Cranch (U. S.), 298.

SPECIAL DEPOSITS. (*See DEPOSITS.*)

## TAXATION.

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## I. GENERALLY.

*Power of Congress to establish national banks and to exempt them from State taxation.*

- 1 (Mass., 1868). Congress has the constitutional right to establish national banks in any State and to provide that the shares of their capital stock shall be exempt from taxation by other States. (*Flint v. Board of Aldermen of Boston*, 99 Mass., 141; 1 N. B. C., 571.)

*Power of Congress to restrict taxation of national banks.*

- 2 (U. S. Sup. Ct., 1877). The act of Congress of June, 1864, in relation to the taxation of national banks, does not curtail State power as to the subject of taxation or cut off the right to except certain kinds of property if a legislature chooses to do so. Its only object is to prevent unfriendly discrimination against national banks. (*Adam v. Mayor, etc., of Nashville*, 95 U. S., 19; 1 N. B. C., 148.)
- 3 (U. S. Sup. Ct., 1869). Conditions imposed on the power of States to tax banks refer to banks of circulation. (*Lionberger v. Rowse*, 9 Wall 468.)
- 4 (U. S. Sup. Ct., 1869). The shareholders may be taxed by the State for their shares, although all the capital of the bank be invested in Federal securities. (*First National Bank of Louisville v. Kentucky*, 9 Wall., 353.)
- 5 (U. S. Sup. Ct., 1869). But the capital of a bank owned by the corporation invested in Government securities can not be taxed. (*Ib.*)

## TAXATION—Continued.

## I. GENERALLY—continued.

- 6 (U. S. Sup. Ct., 1899). A State is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets, or franchises, except when permitted so to do by the legislation of Congress. (*Owensboro National Bank v. Owensboro*, 173 U. S., 664.)
- 7 (U. S. Sup. Ct., 1899). Section 5219 of the Revised Statutes is the measure of the power of States to tax national banks, their property or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. (Ib.)
- 8 (U. S. Sup. Ct., 1899). The taxing law of the State of Kentucky, under the provisions of which the tax in controversy in this case was imposed, is beyond the authority conferred by Congress on the States and is void for repugnancy to that act. (Ib.)
- 9 (U. S. Sup. Ct., 1899). The tax here complained of having been assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal. (Ib.)

*Power of Territories as to taxation of national banks.*

- 10 (U. S. Sup. Ct., 1891). The powers of taxation in the States in respect to national banks exist in the Territories. (*Talbott v. Silver Bow County*, 139 U. S., 438.)

*States can not tax capital stock in solido.*

- 11 (U. S. Sup. Ct., 1899). Taxes imposed upon the franchises and property of the bank, and not upon the shares of stock in the names of the shareholders, are therefore illegal because in violation of the act of Congress. (*Third National Bank of Louisville v. Stone*, 174 U. S., 432.)
- 12 (U. S. C. C.). A State can not tax the capital stock of a national bank as such. The tax must be assessed upon the shares of the different stockholders. (*Collins v. Chicago*, 4 Biss., 472.)
- 13 (U. S. C. C., 1890). Under Revised Statutes, section 5219, which declares that nothing in the national banking act shall prevent all the shares of stock of a national bank from being included in the assessment of the personal property of the owners of such shares, an assessment of the entire stock of a national bank in solido against the bank itself is invalid. (*National Bank of Virginia v. City of Richmond et al.*, 42 Fed. Rep., 877.)
- 14 (U. S. C. C., 1897). The Montana statute (Pol. Code, sec. 3692) provides for assessing shares of bank stock to the owners thereof, and to aid the assessors in determining their value requires the bank to furnish a verified statement showing the amount and number of shares of its capital stock, surplus, etc. An assessor, instead of demanding the statement here required, presented to a national bank a blank form for listing property subject to taxation. The bank did not return a verified list, but its assistant cashier handed to the assessor a statement beginning, "Capital, \$800,000," followed by items of surplus, undivided profits, United States bonds, and real estate. The assessor deducted the amount of the bonds and real estate from the "capital" and assessed the remainder to the bank as stock. *Held*, that the tax was illegal, as the capital of national banks is exempt from taxation under the Federal laws, and as both the State and Federal laws require the shares to be taxed to their owners; and that the form of the return did not warrant the assumption that the bank owned its own shares. (*Brown v. French*, 80 Fed. Rep., 166.)
- 15 (U. S. C. C., 1899). The personal property of national banks can not be directly assessed to them by the State for purpose of taxation. (*City and County of San Francisco v. Crocker-Woolworth Nat. Bank of San Francisco*, 1 Banking Cases, 318; 92 Fed. Rep., 273.)
- 16 (U. S. C. C., 1889). Revised Statutes, United States, section 5219, providing that shares of national-bank stock may be taxed as part of the



## TAXATION—Continued.

## I. GENERALLY—continued.

- personalty of the owner, and that each State may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other "moneyed capital" owned by citizens of the State, and that the shares of nonresidents shall only be taxed in the city wherein the bank is located, does not authorize the taxation of the stock of a bank in solido by the city in which it does business, but only the shares of individual owners residing in the city are taxable, and they must be taxed separately in order that the owner may deduct from their value the amount of the personal indebtedness, where the State laws or municipal ordinances permit such deductions and require equality of taxation. (*First National Bank v. City of Richmond*, 39 Fed. Rep., 309.)
- 17 (U. S. C. C. A., 1898). An assessment in a lump sum of all the personal property of a national bank to the bank itself can not be regarded as one against the stockholders on their shares. (*Stapylton v. Thaggard*, 91 Fed. Rep., 93; 1 B. C., 320.)
- 18 (Ala.). The assessment by a municipal corporation of a tax upon the shares of a national bank in gross or upon its capital stock is void, but the remedy is at law and not by injunction, although the municipal corporation is insolvent. (*National Commercial Bank of Mobile v. Mayor, etc., of Mobile*, 62 Ala., 284; 2 N. B. C., 440.)
- 19 (Ala., 1878). An assessment upon the capital stock of a national bank in gross is invalid, and a provision that the same "shall be paid by each such association for the shareholders thereof," when dependent upon such invalid provision, and incapable of independent enforcement, is also inoperative, and imposes no duty on the bank to pay such tax. (*Sumter County v. National Bank of Gainesville*, 62 Ala., 464; 2 N. B. C., 449.)
- 20 (Cal., 1898). National banks and their property have been withdrawn from the domain of State taxation, except so far as Congress has expressly consented that they may be taxed, and therefore the personal assets of a national bank are exempt from State taxation. (*People v. National Bank of D. O. Mills & Co.*, 1 Banking Cases, 341; 123 Cal., 53.)
- 21 (Kans.). The assessment of the entire capital stock of a national bank in solido against the bank itself is invalid. The bank may pay the tax assessed upon the shares of its different stockholders, and it will have a lien thereon when it pays such tax until the same is satisfied. But if for any cause the tax levied upon the different stockholders is not paid by the bank the property of the individual stockholders will be liable therefor. (*First National Bank of Leoti v. Fisher*, 45 Kans., 726.)
- 22 (Mo. Sup., 1885). Assessment of taxes against national-bank stock must be made against the shareholders personally, and the refusal of the officers of the bank to furnish the assessor with a list of shareholders does not justify making the assessment and enforcing the tax against the property of the bank. (*City of Springfield v. First National Bank of Springfield*, 87 Mo., 441; 3 N. B. C., 524.)
- 23 (Ohio Sup., 1889). There is no authority in the statutes of the State, nor of the United States, for listing and valuing the shares in a national bank in the aggregate and placing such aggregate on the tax list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax list in the names of the respective owners. (*Miller v. First National Bank of Cincinnati*, 3 N. B. C., 711; 46 Ohio St., 424.)
- 24 (Ohio Sup., 1889). The listing of the shares for taxation is provided for and secured by section 2765, Revised Statutes, and the correction of returns made by the cashier of the bank to the county auditors is provided for by section 2769 and not by section 2782, Revised Statutes. (Ib.)

## TAXATION—Continued.

## I. GENERALLY—continued.

*Habitual payment of taxes levied in solido does not estop bank.*

- 25 (Iowa, 1894). A bank is not estopped from denying liability to pay tax levied on its capital stock as the personal property of the bank by the fact that for several years it had paid taxes so levied. (*Farmers and Traders' National Bank v. Hoffman*, 61 N. W., 418; 93 Iowa, 119.)

*State may tax shares in national bank to owner.*

- 26 (U. S. C. C., 1890). Under Revised Statutes, United States, section 5219, providing that shares of national-bank stock may be taxed as part of the personalty of the owner, and that each State may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other moneyed capital owned by citizens of the State, a State may tax national-bank shares held by its corporate or individual citizens as an investment, subject to the restriction that the tax shall not exceed the burden upon similar property in the State. (*First National Bank of Wilmington v. Herbert*, State Treasurer, 44 Fed. Rep., 158.)
- 27 (Ala.). National banks being the creatures of Congress, and the right of the States to tax anything pertaining to them being wholly derived from the grant made by Congress, the power to tax shares in such banks for State purposes must be accepted with all the conditions and reservations annexed to its exercise. (*Maguire v. Board of Revenue and Road Commissioners of Mobile County*, 71 Ala., 401.)
- 28 (Ala.). The Supreme Court of the United States has the reserved power of revising, and, if need be, of reversing the rulings of the State courts bearing on the exercise by the States of the power to tax shares in national banks, and hence the decisions of that court on that subject must be adopted and followed by State courts. (Ib.)
- 29 (Ala.). Touching the power conferred by Congress on the States to tax, that body has carefully discriminated between the capital stock of national banks and the shares in such capital stock, the power to tax the former being withheld from the States, while the power to tax the latter is granted with stated conditions and reservations. (Ib.)
- 30 (N. J., 1878). An assessment of tax on the stock of a national bank in New Jersey, owned by a stockholder residing in the city where the bank is located, can not be sustained by the presumption that the stockholder resided in the ward in which the bank was located, but the assessment must be made against the stockholder. (*State, North Ward National Bank, Pros., v. Newark*, 11 Vroom, 559; 2 N. B. C., 290.)

*When new shares taxable.*

- 31 (S. C.). New shares issued by a national banking association can not be taxed until the increase of capital has been approved by the Comptroller of the Currency. (*Charleston v. People's National Bank*, 5 S. C., 103.)

*State law must authorize taxation of shares.*

- 32 (Me., 1871). Municipal officers can not assess a tax on shares of stock of a national bank unless authorized by a law of the State. (*Stetson v. City of Bangor*, 56 Maine, 274; 1 N. B. C., 520.)
- 33 (Me., 1871). A statute authorizing "the taxation of all shares in moneyed corporations" held sufficient authority to tax shares in national banks. (Ib.)
- 34 (N. Y. Appls., 1873). Assessors of taxes possess no authority except such as is conferred upon them by statute, and they must see to it that they are within the authority committed to them. (*National Bank of Chemung v. Elmira*, 53 New York, 49; 1 N. B. C., 715.)
- 35 (N. Y. Appls., 1873). Assessors assessed a tax on the capital stock of a national bank, which was expressly prohibited by statute. The property of the bank was seized by the collector of taxes and sold to pay

## TAXATION—Continued.

## I. GENERALLY—continued.

such tax, and the proceeds paid over to the municipal treasurer. *Held*, that the assessment was void, and that an action lay on behalf of the bank against the municipal corporation to recover the money. (Ib.)

*Effect of State law taxing shares and requiring bank to pay.*

- 36 (U. S. Sup. Ct., 1869). A State tax upon shares is valid, though the tax is collected from the bank. (*National Bank v. Commonwealth*, 9 Wall., 353.)
- 37 (U. S. Sup. Ct., 1869). And the State may require the banks to pay a tax rightfully laid upon the shares. (Ib.)
- 38 (U. S. Sup. Ct., 1869). National banks may be required to pay a tax assessed on shares instead of individual shareholders. (*Lionberger v. Rouse*, 9 Wall., 468.)
- 39 (U. S. Sup. Ct., 1897). The making the national bank the agent of the State to collect such taxes is a mere matter of procedure, and there is no discrimination against the national banks in the fact that the State banks are not so compelled, but the auditor generally looks to the stockholders directly. (*Merchants and Manufacturers' Bank v. Pennsylvania*, 167 U. S., 461.)
- 40 (U. S. C. C., 1890). Act Louisiana, 1888, section 27, providing that shares in banks shall be assessed to shareholders, but requiring the bank to pay taxes so assessed and authorizing it to collect the same from the shareholders, imposes a tax, not upon the bank, but upon its shares, as permitted by act of Congress providing that a State may determine the manner of taxing the shares of national banks located in the State. (*Whitney National Bank v. Parker*, 41 Fed. Rep., 402.)
- 41 (U. S. C. C., 1893). The imposition of a tax upon the shares of the bank according to the Louisiana statute, which requires the bank to pay the tax and then look to the dividends upon the shares and to the stockholders for reimbursement, is a tax upon the bank itself. (*Citizens' Bank of Louisiana v. Board of Assessors*, 54 Fed. Rep., 73.)
- 42 (U. S. C. C.). A State statute provided that "the stockholders of every national bank located in this State, or of any bank incorporated under the laws of the State, shall be assessed and taxed on the value of their shares of stock therein, subject to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State in the county or precinct where such bank is located. The taxes against such shares shall be levied against the holder of the same, and shall be paid by the bank." *Held*, that a tax so imposed on the shares of a national bank was valid, and that payment thereof could be enforced by distraint of the property of the bank. (*First National Bank v. Douglas County*, 3 Dillon, 330.)
- 43 (Iowa Sup., 1894). Under Code, section 819, providing for the taxation of shares of bank stock, and requiring the officers to furnish the assessors "the name of each person owning shares, and the amount owned by each," an assessment on the capital stock as the personal property of the bank, without mention of the shareholders, is void. (*Farmers and Traders' National Bank v. Hoffman*, 61 N. W., 418; 93 Iowa, 119.)
- 44 (Iowa Sup., 1894). Under Code, section 819, providing that banks shall be liable for the tax on shares of capital stock as the agent of the shareholders, and that they "shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied on his shares," a bank is not liable unless it has money or property belonging to the delinquent shareholder. (Ib.)
- 45 (Iowa Sup., 1894). Evidence that a bank had not declared a dividend for a year previous to the levy of an assessment on its capital stock, and that the surplus which it reported after the assessment was made

## TAXATION—Continued.

## I. GENERALLY—continued.

was worthless, by reason of the shrinkage of the securities composing it, will sustain a finding that, after the assessment, the bank had no money of the shareholder with which to pay the tax. (Ib.)

- 46 (Iowa). But where the tax laws of the State make the bank the *mere agent* for paying the tax on shares, and direct it to retain so much of the dividends as will answer that purpose, other agents being required to pay taxes for their principals only when they have under their control the property, money, or credit of such principals, the bank can not be made liable unless it has the control of the property, etc., of its shareholders or has dividends in its possession or has failed to retain them. (*Hershire v. First National Bank*, 35 Iowa, 272.)

*When dividends subject to taxation.*

- 47 (U. S. Sup. Ct., 1890). If a bank by mistake declares a dividend or adds to its surplus when it is not in condition to do so, such dividend or addition to surplus is subject to taxation, and the mistake can not be corrected in action to recover the tax. (*Central National Bank v. United States*, 137 U. S., 355.)

*Shares of stock in national bank are personalty.*

- 48 (U. S. Sup. Ct., 1873). Shares of stock in national banks are personal property, and the law creating them could give them a *situs* of their own, apart from owners, for purpose of taxation. This was done by act of 1864, section 41. (*Tappan v. Merchants' National Bank*, 19 Wall., 490.)

*State law requiring list of stockholders valid.*

- 49 (U. S. Sup. Ct., 1876). State statute is not void which requires, for purposes of taxation, that the cashier of each national bank within the State transmits to clerks of several towns in State a true list of its stockholders residing there. (*Waite v. Dowley*, 94 U. S., 527; 1 N. B. C., 137.)

*National bank taxable with its shares in another national bank.*

- 50 (U. S. Sup. Ct., 1888). The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership; and, therefore, a national bank may be taxed upon the shares which it holds in another national bank. (*National Bank of Redemption v. Boston*, 125 U. S., 60.)

*National bank taxable with its stock in other corporations.*

- 51 (Wash. Sup., 1899). The statute of Washington under which the value of the stock of other corporations acquired by a national bank in the ordinary course of its business, to prevent loss, is properly included in the assessment of the aggregate value of its stock for taxation is not in conflict with the section of the Federal statute providing that a State shall not tax national-bank stock at a greater rate than other moneyed capital in the hands of individual citizens of the State; as under such statute there is no unjust discrimination between the taxation of national-bank shares as the personal property of the shareholder and the taxation of the personal property of a citizen not a holder of national-bank stock. (*Pacific Nat. Bank of Tacoma v. Pierce County et al.*, 2 Banking Cases, 293; 20 Wash., 675.)

- 52 (Wash. Sup., 1899). Under the laws of Washington, in assessing for taxation the aggregate value of the stock of a national bank it is proper to include in such valuation the stock of other corporations acquired by the bank in the ordinary course of its business, to prevent loss, although the property of such corporations is located, assessed, and taxed within the State, double taxation not being forbidden by the State constitution. (Ib.)

## TAXATION—Continued.

## I. GENERALLY—continued.

*Undivided surplus, when taxable.*

53. The undivided surplus of a national banking association, unless invested in Federal securities, may be lawfully taxed by the State.

(N. H.) *First National Bank v. Peterborough*, 56 N. H., 38;

(N. J.) *North Ward National Bank of Newark v. City of Newark*, 39 N. J., 380.

- 54 (N. J.). But, of course, if the surplus is taken into consideration in estimating the taxable value of the shares, it is not to be taxed separately. (*North Ward National Bank v. City of Newark*, supra.)

NOTE (Md.-Iowa).—But it has been held in Maryland that the stock of an association represents its whole property, and where a tax is assessed upon the shares a separate tax upon the real or personal estate amounts to double taxation; and, therefore, where the organic laws of the State prohibit double taxation, such a tax upon the property of an association is void. (*County Commissioners v. Farmers and Mechanics' National Bank*, 48 Md., 117; *National State Bank v. Young*, 25 Iowa, 311, wherein it was held that the State could tax only the shares *eo nomine* and the real estate.)

- 55 (N. H.). The surplus fund of a national banking association is not excluded in the valuation of its shares for taxation. (*Strafford National Bank v. Dover*, 59 N. H., 316.)

*Personal taxation of national-bank officers.*

- 56 (Ga. Sup., 1899). The words of an act which impose a tax on the presidents "of each of the banks of the State" include the presidents of all banks doing business in the State. Such an act, however, is inoperative when sought to be applied to the presidents of national banking associations organized under the acts of Congress, because such associations are instrumentalities created by Congress, and designed to aid in the administration of an important branch of the public service. The business of such an association not being subject to be taxed by the laws of the State, and the president being an officer prescribed by the act of Congress, through whom, in part, the business of the association must be carried on, a tax on the president, as such, would tend to retard and burden the operation of the law which provides for the creation and maintenance of such institutions. (*Linton, Tax Collector, v. Childs*, 1 Banking Cases, 306.)

*Taxation during conversion.*

- 57 (Pa. Com. Pl., 1874). While a State bank is changing to a national bank, and before the requirements of the State statute are fully complied with, it is subject to State taxation. (*Commonwealth v. Manufacturers and Mechanics' Bank of Philadelphia*, 2 Pearson's Decisions, 386; 2 N. B. C., p. 459 of addenda.)
- 58 (Pa. Com. Pl., 1874). A State bank being converted to a national bank is a subject of State taxation until there has been a strict compliance with all the requirements of the statute. (*Commonwealth v. Manufacturers and Mechanics' Bank of Philadelphia*, 2 N. B. C., 459.)

*When State law requiring tax after conversion void.*

- 59 (Md. Appls., 1870). A State bank was by its charter required to pay the State a tax or bonus on its capital paid in. A statute afterwards authorized State banks to reorganize as national banks, provided that all sums required by their charter to be paid to the State continued to be paid as theretofore. *Held*, that a State bank had the right to surrender its charter, and by so doing discharge itself from its obligation to pay the required bonus, and that the State could not require it, in reorganizing as a national bank, to pay any bonus. (*State v. The National Bank of Baltimore*, 33 Maryland, 75; 1 N. B. C., 527.)

## TAXATION—Continued.

## I. GENERALLY—continued.

*Liabilities for sale of shares subject to lien of taxes.*

- 60 (Wis.). The statute of Wisconsin made taxes assessed on shares of stock in national banks a lien on such stock. The defendant sold to plaintiff shares of stock in a national bank, upon which was an unpaid tax. Defendant gave plaintiff a written statement purporting to contain all facts affecting the value of the stock, but in which the tax was not mentioned. The tax was paid by the bank. *Held*, that plaintiff could recover damages of the defendant to the amount of the tax. (*Simmons v. Aldrich*, 41 Wisconsin, 240.)

*Privileges of revenue officers.*

- 61 (U. S. Sup. Ct., 1877). Under section 3177 of the Revised Statutes United States authority is given to any collector, deputy collector, or inspector of internal revenue to enter in the daytime any building or place within his district where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects shall for every such refusal forfeit five hundred dollars. *Held*, that under this provision paid bank checks, which were duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation, and an officer of a bank where such checks are may lawfully refuse to suffer the collector to examine such checks. (United States, Plaintiff in Error, *v. Mann*, 95 U. S., 580; 1 N. B. C., 154.)

*Meaning of "moneyed capital."*

- 62 (U. S. Sup. Ct.). The term "other moneyed capital" does not necessarily embrace shares of stock in all corporations whose capital is employed in business carried on for the pecuniary profit of shareholders. The test is to be found in the nature of the business in which the corporation is engaged. The act simply prohibits taxation at a greater rate than like property similarly situated.  
(U. S. Sup. Ct., 1887) *Mercantile National Bank v. New York*, 121 U. S., 138;  
(U. S. Sup. Ct., 1887) *Newark Banking Co. v. Newark*, 121 U. S., 163;  
(U. S. Sup. Ct., 1891) *Talbot v. Silverbow Co.*, 139 U. S., 438.
- 63 (U. S. Sup. Ct., 1899). The term "moneyed capital," as used in section 5219 of the Revised Statutes of the United States, does not include capital which does not come in competition with the business of national banks, and exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national-bank shares, can not be regarded as forbidden by the Federal statute. (*First Nat. Bank of Wellington, Ohio, v. Chapman*, Treasurer of Lorain County, Ohio, 1 Banking Cases, 325; 173 U. S., 205.)
- 64 (U. S. Sup. Ct., 1901). The term "moneyed capital," as employed in United States Revised Statutes, section 5219, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come in competition with the business of national banks. (*Commercial National Bank of Ogden, Plff. in Err., v. Alma D. Chambers*, as Treasurer of Weber County, Utah, 3 Banking Cases, 585; 182 U. S., 556.)
- 65 (U. S. C. C. A., 1900). It is equality of assessment with other moneyed capital that is sought to be obtained by section 5219 of the United States Revised Statutes, providing that national-bank shares shall not be taxed at "a greater rate than is assessed upon other moneyed

## TAXATION—Continued.

## I. GENERALLY—continued.

- capital in the hands of individual citizens of such State," and not equality with personal property generally. And railroad companies, manufacturing or mining companies, and the various commercial enterprises in which capital is employed are not within the contemplation of such provision. (*National Bank of Baltimore v. Mayor, etc., of Baltimore et al.*, 2 Banking Cases, 665; 100 Fed. Rep., 24.)
- 66 (U. S. C. C. A., 1900). Wherever money is employed in the carrying on of a business, the object of which is the making of profit by its use as money, it is moneyed capital within the meaning of such section of the Federal statute. So, when such capital is invested in loans or securities of a permanent or temporary character, it is so invested with a view to sale and reinvestment for the purpose of making money by the operation, it is moneyed capital within the meaning of such section, but the securities themselves do not necessarily come within the definition. (*Ib.*)
- 67 (U. S. C. C., 1886). The term "moneyed capital" has a more limited meaning than the term "personal property," and applies to such capital as is readily solvable in money. (*Mercantile National Bank of City of New York v. Mayor, etc., of City of New York and Another.* 28 Fed. Rep., 776.)
- 68 (U. S. C. C., 1894). Stock in railroad, insurance, and manufacturing corporations is not regarded as "moneyed capital." (*Mercantile Nat. Bank v. Shields*, 59 Fed. Rep., 952.)
- 69 (N. J. Appls., 1901). By the provisions of section 5219 of the Federal statutes respecting national banks, the shares of their stock may be taxed to the owners thereof by the States, subject to the restriction that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. This restriction having been construed by the Federal courts to relate to such other moneyed capital as, by its use, comes into competition with the business of national banks, the owners of national-bank stock may require the courts to consider and determine whether such other moneyed capital is taxed by State laws at a less rate than is imposed thereby upon national-bank stock." (*Mechanics' Nat. Bank of Trenton v. Baker, Tax Receiver*, 3 Banking Cases, 430; 48 Atl. Rep., 582; 65 N. J. L., 549.)

## NATIONAL BANKS NOT SUBJECT TO LICENSE TAX.

*States had no right to tax Bank of the United States.*

1. The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any State. The State, within which such branch may be established, can not, without violating the Constitution, tax that branch. The State governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government. This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed on the proprietary interest which the citizens of that State may hold in this institution, in common with other property of the same description throughout the State. (*U. S. Sup. Ct., 1819*) *McCulloch v. State of Maryland*, 17 U. S. (4 Wheat.), 316; (*U. S. Sup. Ct., 1824*) *Osborne et al., appellants, v. Bank of the United States*, 22 U. S. (9 Wheat.), 738.

## TAXATION—Continued.

## NATIONAL BANKS NOT SUBJECT TO LICENSE TAX—continued.

*States without power to levy any taxes on national banks except such as are permitted by Congress.*

- 2 (U. S. Sup. Ct., 1899). A State is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets, or franchises, except when permitted so to do by the legislation of Congress. (*Owensboro National Bank v. Owensboro*, 173 U. S., 664.)
- 3 (U. S. Sup. Ct., 1899). Section 5219 of the Revised Statutes is the measure of the power of States to tax national banks, their property, or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. (Ib.)
- 4 (U. S. Sup. Ct., 1899). The taxing law of the State of Kentucky, under the provisions of which the tax in controversy in this case was imposed, is beyond the authority conferred by Congress on the States, and is void for repugnancy to that act. (Ib.)
- 5 (U. S. Sup. Ct., 1899). The tax here complained of having been assessed on the franchise or intangible property of the corporation was not within the purview of the authority conferred by the act of Congress, and was therefore illegal. (Ib.)

*State can not impose license tax.*

- 6 (Idaho, 1902). Section 1644 of the Revised Statutes of the State of Idaho, imposing a license tax upon persons, associations or corporations engaged in the occupation of banking, does not apply to national banks, as it is not within the power of the State to impose upon national banking associations a license to do business. (*State of Idaho v. First National Bank of Boise City*; decided by the District Court of Idaho in 1902, but not reported.)

*City can not impose license tax.*

- 7 (Ga.). National banking associations can not be subjected to a license or privilege tax. (*Mayor v. First National Bank of Macon*, 59 Ga., 648.)
- 8 (Mo. Sup., 1880). A city has no power to exact a license fee from a national bank. (*City of Carthage v. First National Bank of Carthage*, 2 N. B. C., 279; 71 Mo., 508.)
- 9 (Tenn. Sup., 1875). National banks are not liable to a privilege tax imposed by city ordinance on occupation and business transactions, although "banks and banking" are in terms included. (*National Bank of Chattanooga v. Mayor*, 8 Heiskell, 814; 1 N. B. C., 903.)

## TAXATION OF REAL ESTATE.

*State may tax bank's realty.*

- 1 (U. S. C. C. A., 1898). A State can not tax a national bank except upon its real property. (*Stapylton v. Thaggard*, 91 Fed. Rep., 93; 1 B. C., 320.)

*When bank's realty should not be taxed.*

- 2 (Conn., 1902). General Statutes 1888, section 3832, provides for the taxation of the property of every corporation whose stock is not taxable, and whose property is not exempt by law. Section 3833 provides that real estate owned by any corporation, not required in its business, shall be taxable as provided in the preceding section. Section 3836 provides that shares of capital stock of national banks shall be taxed to the shareholders, but so much of the capital as may be invested in real estate on which it pays a tax shall be deducted from the market value of its stock. *Held*, that property of a national bank used in the transaction of its business is not subject to direct taxation. (*Middletown National Bank v. Town of Middletown*, 51 Atl. Rep., 138; 4 Banking Cases, 377; 74 Conn., 449.)



## TAXATION—Continued.

## TAXATION OF REAL ESTATE—continued.

- 3 (Md., 1877). A State may tax the real property or the capital stock of a national bank, but not both. (County Commissioners of Frederick County v. Farmers and Mechanics' National Bank of Frederick, 48 Md., 117; 2 N. B. C., 252.)
- 4 (Minn. Sup., 1877). Under a statute requiring shares in national banks to be taxed at their actual value without reduction for real estate, the banking office and lot, owned and occupied as its place of business by a national bank created, is not liable to assessment and taxation as real estate *eo nomine* against the bank. (Commissioners of Rice County v. Citizens' National Bank of Faribault, 23 Minn., 280; 1 N. B. C., 629.)
- 5 (Pa., 1879). Where part of the capital of a national bank is invested in a building used for banking purposes, and the bank pays into the State tax prescribed upon the par value of all its shares, the building can not be taxed for county purposes, although the cashier occupies part of it as a residence. (County of Lancaster v. Lancaster County National Bank, 7 Weekly Notes of Cases, 29; 2 N. B. C., 415.)

*Bank's real estate part of its "assets."*

- 6 (Miss. Sup., 1890). Real estate owned by a bank constitutes part of its assets, within the meaning of Code of Mississippi providing that banks shall pay a privilege tax, whose amount varies with their "capital stock or assets," in lieu of all other taxes. (Vicksburg Bank v. Worrell, 7 So., 219; 67 Miss., 47.)

## RIGHT OF STATE OFFICERS TO EXAMINE BOOKS.

*Books of a national bank may be examined by State officers for purposes of taxation.*

- 1 (U. S. C. C., 1881). A national bank may be compelled to disclose the names of its depositors and the amounts of their deposits under the compulsory process of a State court, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners. (First National Bank of Youngstown v. Hughes and another, 6 Fed. Rep., 737.)
- 2 (U. S. C. C., 1881). A Federal court can not, in such case, stay the proceedings in the State court by writ of injunction. (Ib.)
- 3 (Ind. Sup., 1902). Under Burns's Revised Statutes (Indiana), 1894, section 8444, providing that for the purpose of properly listing property for taxation the assessor may inspect the books of corporations, he can not examine the account of any depositor in a bank, regardless of whether he is bound to pay taxes in the State. (Applegate v. State, ex rel. Bowling, Assessor, 63 N. E. Rep., 16; 4 Banking Cases, 295; 158 Ind., 119.)
- 4 (Ind. Sup., 1902). The petition for mandamus and the alternative writ to compel a bank to allow inspection of its books by the tax assessor under Burns's Revised Statutes, 1894, section 8444, are insufficient, they proceeding on the theory that he can examine the account of any depositor regardless of whether he is bound to pay taxes in the State, and not alleging what taxpayer had omitted to make returns of deposits therein, or that any taxpayer who was a depositor therein had omitted to make proper return. (Ib.)

*Section 3177, Revised Statutes United States, held not to apply to examination for purposes of taxation of paid bank checks duly stamped.*

- 5 (U. S. Sup. Ct., 1877). Under section 3177 of the Revised Statutes United States, authority is given to any collector, deputy collector, or inspector of internal revenue to enter in the daytime any building or place within his district where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the pro-

## TAXATION—Continued.

## RIGHT OF STATE OFFICERS TO EXAMINE BOOKS—continued.

vision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects shall for every such refusal forfeit \$500. *Held*, that under this provision paid bank checks, which were duly and sufficiently stamped at the time they were made, signed, and issued, are not articles or objects subject to taxation, and an officer of a bank where such checks are may lawfully refuse to suffer the collector to examine such checks. (United States, plaintiff in error, *v. Mann*, 95 U. S., 580; 1 N. B. C., 154.)

*Under section 3177, Revised Statutes United States, internal-revenue officers may examine bank books.*

- 6 (U. S. Dist. Ct., 1875). The law under which national banks are incorporated does not exempt them from examination by the internal-revenue officers, mentioned in section 3177 of the Revised Statutes. A clerk of a supervisor of internal revenue is, however, not such an officer. (*The United States v. Rhawn*, 1 N. B. C., 358.)

## DEDUCTIONS.

*When portion of capital invested in United States bonds or securities of United States.*

- 1 (U. S. Sup. Ct., 1865). The entire interests of the shareholders may be taxed without any deduction for that portion of the capital which is invested in United States securities. (*Van Allen v. The Assessors*, 3 Wall., 573.)
- 2 (U. S. C. C., 1890). Under act Louisiana, 1888, section 27, relating to taxation of national-bank shares, making no deduction for that part of the bank's property entering into their value which consists of non-taxable State and national securities, which deductions may, under the act, be made by individuals, a tax on national-bank shares violates Revised Statutes, section 5219, prohibiting the assessment of such shares at a greater rate than moneyed capital in the hands of individual citizens; and it is immaterial that the same discrimination is made against other corporations. (*Whitney National Bank v. Parker*, 41 Fed. Rep., 402.)
- 3 (Tex. Civ. App., 1894). An assessment upon national-bank stocks is not violative of a constitutional provision declaring that taxation shall be equal and uniform, though in such assessment the owners of such stocks are denied the right to deduct from the value of such shares the amount of capital invested by the banks in United States bonds and legal-tender notes, and such a deduction is given to private bankers. (*Adair, Tax Collector, v. Robinson et al.*, 25 S. W., 734; 6 Tex. Civ. App., 275.)
- 4 (Tex. Civ. App., 1894). Nor is such an assessment for this reason in violation of the Federal statute. (*Ib.*)

*When value of real estate can not be deducted in appraising value of bank stock.*

- 5 (U. S. Sup. Ct., 1901). The refusal to deduct the value of real estate owned in other States by a national bank, from the value of its shares of stock, does not make an unlawful discrimination against such banks under United States Revised Statutes, section 5219, or deny them the equal protection of the laws, where such a deduction is not authorized by the laws of the State in valuing shares of stock of other corporations. (*Commercial Nat'l Bank of Ogden v. Alma D. Chambers, Treasurer*, 182 U. S., 556; 3 B. C., 585.)
- 6 (Ill. Sup., 1903). Revised Statutes U. S., section 5219, provides that the shares of national banks shall be assessable for taxation in the hands of their owners, but not at a greater rate than assessed on other "moneyed capital" in the hands of individual citizens of the State, and that the real property of such banks may be taxed to the

## TAXATION—Continued.

## DEDUCTIONS—continued.

same extent as other real estate is taxed: *Held*, that the "moneyed capital" referred to was money invested in other banking institutions, and therefore if the shares or personality of other banks were taxed at their full value in addition to taxation on the real estate of such banks, the shares of national banks might also be taxed in the same manner. (*Illinois Nat'l Bank v. Kinsella*, 66 N. E. Rep., 338; 5 B. C., 414.)

*Deduction of debt of shareholders—When State law discriminates in favor of other moneyed capital.*

- 7 (U. S. Sup. Ct., 1879). A State law which does not permit a deduction to be made from the assessed value of bank shares for all debts due by the holder thereof while authorizing such a deduction to be made from the assessed value of moneyed capital otherwise invested, is void. (*People ex rel. Williams v. Weaver*, 100 U. S., 539, reversing S. C., 67 N. Y., 516, and overruling *People v. Dolan*, 36 N. Y., 59.)
- 8 (U. S. Sup. Ct., 1901). A construction of a State statute by a State court, on the question of deduction for purposes of taxation, is binding on the Supreme Court of the United States. (*Commercial National Bank of Ogden, Plff. in Err., v. Alma D. Chambers*, as Treasurer of Weber County, Utah, 3 B. C., 585; 182 U. S., 556.)
- 9 (U. S. Sup. Ct., 1881). Where under the statute of New York a stockholder in a national bank presented to the proper board of assessors his affidavit, showing that his personal property subject to taxation, including such shares, after deducting therefrom his just debts, is of no value, and they refused on his demand to reduce the assessment of the shares, an injunction should be awarded to restrain them from collecting the tax. (*Hills v. National Albany Exchange Bank*, 105 U. S., 319.)
- 10 (U. S. Sup. Ct., 1881). The taxation of national-bank shares by the statute of Indiana without permitting the owner of them to deduct from their assessed value the amount of his bona fide indebtedness, as he may in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress. (*Evansville National Bank v. Britton*, 105 U. S., 322.)
- 11 (U. S. Sup. Ct., 1881). State statutes taxing shares without permitting owner to deduct his indebtedness, as allowed to owners of other personal property, make a discrimination forbidden by acts of Congress. (U. S. Sup. Ct., 1881) *Albany Co., Supervisors, v. Stanley*, 105 U. S., 305.
- 12 (U. S. Sup. Ct., 1890). Under acts permitting the deduction of debts from the value of all a person's taxable property such deduction must be permitted from the value of national-bank shares; but a statute is not void because it does not provide for a deduction; nor is the assessment void if deductions are not made, but voidable only. (*Palmer v. McMahon*, 133 U. S., 660.)
13. The taxation of national-bank shares under a State statute without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by Congress. (U. S. Sup. Ct., 1881) *Albany Co. v. Stanley*, 105 U. S., 305; (U. S. Sup. Ct., 1879) *New York v. Weaver*, 100 U. S., 539; (U. S. Sup. Ct., 1881) *Hills v. Nat. Albany Exchange Bank*, 105 U. S., 319.
- 14 (U. S. C. C., 1894). Where the tax laws of a State deny to the holders of national-bank stock the right to deduct from the value of their shares their bona fide indebtedness, while conferring this right upon other moneyed capital, an assessment upon national-bank stock will be void. (*Mercantile National Bank v. Shields*, 59 Fed. Rep., 952.)

## TAXATION—Continued.

## DEDUCTIONS—continued.

- 15 (U. S. C. C., 1894). It is immaterial that such deductions are not allowed to the holder of stock in railroad, insurance, and manufacturing corporations, since such stock is not regarded as "moneyed capital." (Ib.)
- 16 (U. S. C. C., 1894). Nonresident stockholders are entitled to the same deductions as resident stockholders. (Ib.)
- 17 (U. S. C. C., 1887). The owners of shares in national banks are, under section 5219, Revised Statutes, United States, entitled to the right of deduction given to taxpayers under section 814 of the Code of Iowa, which provides that from the gross amount of money and credits held by one liable to taxation may be deducted all debts due and owing. (*Richards et al. v. Incorporated Town of Rock Rapids, Iowa*, 31 Fed. Rep., 505.)
- 18 (Ind. Sup., 1886). Where a tax law of a State allows taxpayers to deduct their debts from the assessed value of a class of credits which constitute a material portion of the moneyed capital of the State in the hands of its citizens, but denies to the owners of national-bank stock the right to deduct their debts from the assessed value of such stock, it is an invalid discrimination under section 5219, United States Revised Statutes. (*Wasson v. First National Bank of Indianapolis*, 3 N. B. C., 419; 107 Ind., 206; 8 N. E. Rep., 97.)
- 19 (Nebr. Sup., 1889). In the assessment and taxation of shares of national-bank stock, the owners thereof, having no other credits or moneyed capital, are entitled to deduct their bona fide debts from the value of such shares of stock. (*Bressler v. Wayne County*, 25 Nebr., 468; 3 N. B. C., 564.)
- 20 (N. C. Sup., 1887). The revenue act of North Carolina (act 1885, chapter 177, section 12) enumerates what shall be deemed "solvent credits," and provides that the party taxed "may deduct from the amount of solvent credits owing to him the amount of collectible debts owing by him as principal debtor." Held, that the holder of stock of a national bank located in said State was entitled to deduct his indebtedness from the valuation of his shares of said stock, although national-bank stock was not included in the statute enumeration of "solvent credits." (*McAden v. Commissioners of Mecklenburg County*, 97 N. C., 355; 3 N. B. C., 694.)
- 21 (N. J. Sup., 1899). The taxation of the shares of stock in national banks, under the act of April 1, 1869 (3 Gen. St., 3302), is substantially taxation of all the property of the banks, so that debtors of such banks, who have secured the debts by mortgaging their real estate, may properly claim to deduct the debts from the assessed value of the realty. (*State (Myers, Prosecutor) v. Campbell, Collector of the Town of Newton*, 2 Banking Cases, 195; 64 N. J. L., 186.)
- 22 (N. J. Sup., 1899). The act of March 28, 1895 (3 Gen. St., 3455), does not impair the right to have debts which are due to national banks, and are secured by mortgage on real estate, deducted from the assessed value of the realty, for the purpose of taxation. (Ib.)
- 23 (Ohio). The tax laws of Ohio do not authorize the deduction from the value of shares in a national bank, entered on the duplicate for taxation, of legal, bona fide debts owing by the holder of such shares of stock. (*Niles v. Shaw*, 50 Ohio St., 370; 34 N. E., 162.)
- 24 (Utah Sup., 1900). The term "moneyed capital," employed in section 5219, Revised Statutes United States, does not require that where, under a system of taxation such as ours, debts may be deducted from credits, the individual debts of a shareholder in a national bank must be deducted from the value of his stock; neither does the term include money which does not come into competition with the business of the bank. Debts disconnected from such business can not be deducted from the amount of the capital, and the shares of stock can not be treated as credits. (*Commercial Nat. Bank of Ogden v. Chambers, County Treasurer*, 2 Banking Cases, 682; 21 Utah, 324.)

## TAXATION—Continued.

## ASSESSMENT OF SHARES.

*At what place national-bank shares taxable.*

- 1 (U. S. Sup. Ct., 1866). A State statute required the assessors of each city and town in which any shareholder in national banks resided to include such shares in the assessment of such person. The defendant resided in Boston, owned shares in several national banks there situated, and was there assessed on such shares. He refused to pay the tax on the ground that the State statute was in violation of the national banking act permitting States to tax shares of national banks "at the place where such bank is located and not elsewhere." *Held*, that as in this case the assessment was in conformity to the act of Congress, the defendant had no cause for complaint and could not impeach the validity of the State statute. (*Austin v. The Aldermen*, 7 Wall., 694; 1 N. B. C., 15.)
- 2 (U. S. C. C., 1878). A national bank, located in New Jersey, for the convenience of persons in Philadelphia kept a clerk in that city who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable to taxation. (National State Bank of Camden *v. Pierce*, 18 Albany Law Journal, 16; 2 N. B. C., 177.)
- 3 (Ill. Sup., 1872). A State statute providing that shares of stock in national banks shall be taxed in the county, town, or district where such banks are situated, whether the shareholders reside in such county, town, or district or not, is valid. (First National Bank of Mendota *v. Smith*, 65 Illinois, 44; 1 N. B. C., 390.)
- 4 (Ind. Sup., 1870). The requirement that the stock shall be taxed at the place where the bank is located is not invalid where the owner of the stock lives in another county or State. (*Whitney et al., Appellants, v. Ragsdale, Treasurer*, 33 Indiana, 107; 1 N. B. C., 429.)
- 5 (Mass. Sup., 1868). Under section 41 of the national banking act of 1864 it is unlawful for a State to impose a tax on shares owned by an inhabitant thereof in the capital stock of a national bank located in another State. (*Flint v. Board of Aldermen of Boston*, 99 Massachusetts, 141; 1 N. B. C., 571.)
- 6 (Mass. Sup., 1873). A statute made it the duty of every shareholder in a national bank to give notice to the bank of his true residence each year, and, in case of neglect, made the shares taxable where the bank was located as well as where the shareholder resided. *Held*, that a shareholder was rightfully taxed upon his shares in the town where he resided, although he had, through an honest mistake, notified the cashier that his residence was in another town. (*Goldsbury v. Inhabitants of Warwick*, 112 Massachusetts, 384; 1 N. B. C., 592.)
- 7 (Mich., 1877). By general law of a State, shares of stock in national banks were to be taxed in the township where the bank was located, except that where a stockholder resided in another township in the same county his shares were to be there taxed. A village charter authorized the taxation of "all property, real and personal, within the limits of said village." *Held*, not to authorize a tax on shares of stock in a national bank located in such village, owned by a resident of another township in the same county. (*Howell v. The Village of Cassopolis*, 35 Michigan, 471; 1 N. B. C., 627.)
- 8 (N. C., 1876). Under a State constitution requiring all property not specifically exempt to be taxed, State assessors must tax the shares of national-bank stock belonging to nonresidents of the State in the city or town where the bank is located, although there is no State statute expressly directing such taxation. (*Kyle v. The Mayor, etc.*, 75 North Carolina, 445; 1 N. B. C., 808.)
- 9 (N. C., 1878). National-bank shares owned by residents may be assessed at their residence or at the location of the bank, as the State legislature may direct, and a State law directing the assessment where the person required to list them resides is valid. (*Buie v. Commissioners of Fayetteville*, 75 N. C., 267; 2 N. B. C., 343.)

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

- 10 (Utah Sup., 1900). Although a national bank is organized under the banking act of the United States, if it is located in this State and conducting its business here, all its property not exempt, situate, or held, owned, and used within this jurisdiction is within the taxing power of this State under the provisions of section 5219, Revised Statutes United States, and such power extends to every species of property which exists within the limits of the State by its authority or which is introduced by permission of the State, unless such power be excluded expressly or by necessary implication. (Commercial Nat. Bank of Ogden v. Chambers, County Treasurer, 2 Banking Cases, 682; 21 Utah, 324; affirmed by U. S. Sup. Ct., 182 U. S., 556.)
- 11 (Utah Sup., 1900). Under the power of taxation property must be treated as it exists within the jurisdiction of such taxing power and without reference to the powers of another State over which there is no jurisdiction whatever. (Ib.)
- 12 (Utah Sup., 1900). A State has the right to fix the particular situs of the stock of a corporation doing business within its limits for the purposes of taxation, and its value for such purposes can not be diminished by deducting therefrom the value of property not situated or taxable within the State and over which the State can exercise no control. (Ib.)

*When "moneyed capital" given advantage is inconsiderable.*

- 13 (U. S. Sup. Ct., 1896). The mere fact that a State statute permits some debts to be deducted from some moneyed capital for the purpose of assessment for taxation, but not from that which is invested in the shares of national banks, does not show a violation of Revised Statutes, section 5219, forbidding State taxation of national-bank shares to be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, there being nothing to show that the amount of moneyed capital in the State from which debts may be deducted, as compared to the moneyed capital invested in national-bank shares, was so large and substantial as to amount to an illegal discrimination against national-bank shareholders. (First National Bank v. Ayers, 16 S. Ct., 412; 160 U. S., 660.)
- 14 (Ind. Sup., 1886). Courts will take judicial notice that the moneyed capital from which the taxpayer may so deduct his debts is a material portion of the whole moneyed capital of the State. See 5 Am. St. Rep., 846, note. (Wasson v. First National Bank of Indianapolis, 3 N. B. C., 419; 107 Ind., 206; 8 N. E. Rep., 97.)

*When State banks are taxed on capital.*

15. Where the State banks are taxed upon the capital, no tax can be imposed upon the shares of national banking associations; for, as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, a tax on capital is not equivalent to a tax on shares.  
(U. S. Sup. Ct., 1865) Van Allen v. The Assessors, 3 Wall., 573;  
(U. S. Sup. Ct., 1866) Bradley v. Illinois, 4 Wall., 459.
16. But though the tax upon the State banks is not *eo nomine* a tax on shares, yet if it is equivalent to such a tax the shares in the national banking associations located in that State may be taxed.  
(Ohio) Frazer v. Seibern, 16 Ohio St., 614;  
(Wis.) Van Slyke v. State, 2 Wis., 655;  
(Wis.) Boynoll v. State, 25 Wis., 112.

*Same rate required on State and national bank shares.*

- 17 (U. S. Sup. Ct., 1869). Congress meant no more than to require of the States, as a condition to the exercise of the power to tax the shares in national banks, that they should, as far as they had the capacity, tax in like manner the shares of banks of issue of their own creation. (Lionberger v. Rouse, 9 Wall., 468.)

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

- 18 (U. S. Sup. Ct., 1869). Therefore, where a State has previously contracted with the banks which it has chartered that they shall not be taxed above a certain rate, a tax upon national-bank shares at a greater rate is not invalid, if this rate is not greater than that assessed upon all the moneyed capital within the State, except that of the State banks. (Ib.)
- 19 (U. S. Sup. Ct., 1866). The intention of Congress was that the rate of taxation of the shares should be the same as, or no greater than, the tax upon the moneyed capital of the individual citizen which is *subject and liable to taxation*. (People v. The Commissioners, 4 Wall., 244.)
- 20 (U. S. Sup. Ct., 1865). New York act of 1865, subjecting shares of national banks to taxation, but not providing that the tax should not exceed rate imposed on State banks, is void, as there was no tax on shares of State banks—only on the capital. (Van Allen v. Assessors, 3 Wall., 573.)
- 21 (U. S. C. C., 1877). Where by local legislation different rates are prescribed for different classes of moneyed capital, the rate imposed upon shares of national banks should not as a general rule exceed the rate imposed upon other moneyed capital of the same or similar class, viz, shares of State banks. (City National Bank v. Paducah, 5 Cent. L. J., 347; 1 N. B. C., 300.)

*Effect of partial or complete exemption of State-bank shares and other moneyed capital.*

- 22 (U. S. Sup. Ct., 1881). The shares of a national bank are not relieved from taxation because a single bank of the State has been favored by mistake or by intention. (Albany Co. v. Stanley, 105 U. S., 305.)
- 23 (U. S. Sup. Ct., 1885). National-bank shares can not be subjected to State taxation where a large part relatively of other moneyed capital in hands of individual citizens in same taxing district is exempted. (Boyer v. Boyer, 113 U. S., 689.)
- 24 (U. S. Sup. Ct., 1897). Money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages does not come into competition with the business of national banks, and is therefore not within the meaning of the provision in Revised Statutes, section 5219, forbidding State taxation of its shares at a greater rate than is assessed upon other moneyed capital in the hands of the citizen of the State. (First Natl. Bank of Aberdeen v. Chehalis County, 166 U. S., 440.)
- 25 (U. S. Sup. Ct., 1897). Insurance stocks may be taxed on income instead of on value, and deposits in savings banks and moneys belonging to charitable institutions may be exempted without infringing the provisions of that section of the Revised Statutes. (Ib.)
- 26 (U. S. Sup. Ct., 1897). The allegations of the complaint do not show that any moneyed capital of the bank of the character defined by the decisions of this court was omitted or intended to be omitted by the assessor, and those allegations are so general in these respects that they can not be made the basis of action. (Ib.)
- 27 (U. S. Sup. Ct.). The main purpose of Congress in fixing limits to State taxation on investments in the shares of national banks was to render it impossible for the State in levying such a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on similar business and operations and investments of a like character; and the language of the law is to be read in the light of this policy. And therefore the exemption of shares of stock in corporations the business of which does not come into competition with that of the national bank (e. g., railroad companies, mining companies, manufacturing companies, and insurance companies) does not invalidate a tax upon national-bank shares.

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

Capital thus employed is not "moneyed capital" within the meaning of the act of Congress.

- (U. S. Sup. Ct., 1887) *Mercantile National Bank v. New York*, 121 U. S., 138;  
 (U. S. Sup. Ct., 1887) *Newark Banking Co. v. Newark*, 121 U. S., 163;  
 (U. S. Sup. Ct., 1888) *National Bank of Redemption v. Boston*, 125 U. S., 60.
- 28 (U. S. Sup. Ct.). Although deposits in savings banks constitute moneyed capital in the hands of individuals within the terms of any definition which can be given of that phrase, yet they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation; for it can not be supposed that savings banks come into any possible competition with national banks. (Ib.)
- 29 (U. S. Sup. Ct., 1885). But though Congress did not contemplate that there should be an absolute equality (which in the nature of things is impossible), yet it did intend that there should be a substantial equality; and therefore if the exemptions in favor of other moneyed capital are so palpable as to show that there is a serious discrimination against capital invested in the shares of national banking associations the tax will be declared unlawful. (*Boyer v. Boyer*, 113 U. S., 690.)
- 30 (U. S. C. C., 1881). The exemption from taxation of the shares of various corporations under the provisions of a State statute does not exempt "moneyed capital in the hands of individual citizens," within the meaning of section 5219 of the Revised Statutes, relating to the taxation of national-bank shares. (*First National Bank of Utica v. Waters* and another, 7 Fed. Rep., 152.)
- 31 (U. S. C. C., 1881). The omission of a city clerk to extend upon the assessment roll the amount to be paid by each shareholder until after such roll has been delivered to the city treasurer does not render the taxation of such shares void. (Ib.)
- 32 (U. S. C. C., 1881). In such case, therefore, the tax collector is protected by his warrant, when both such warrant and assessment were apparently regular when they came to his hands. (Ib.)
- 33 (U. S. C. C., 1887). Section 5219, Revised Statutes United States, provides that shares in the national banks may be subjected to the imposition of a State tax, but the same shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. Under this section, before the assessment of the shares in a national bank can be held invalid, it must be shown that there is in fact a higher burden of taxation imposed upon money thus invested than is imposed upon other moneyed capital, and it is insufficient to show merely that the State laws provide a different mode or manner of taxing moneyed capital invested in savings banks or other corporations. (*Richards et al. v. Incorporated Town of Rock Rapids*, 31 Fed. Rep., 505.)
- 34 (U. S. C. C., 1887). Sections 818–820, Code, Iowa, providing for the taxation of the shares of national banks, and chapter 60 of the Laws of 1874, providing for the organization of savings banks, and enacting that the shares of stock therein are taxable, but that deposits are not, are not in contravention of section 5219, Revised Statutes of the United States, there being no discrimination against national banks or the capital therein invested. (Ib.)
- 35 (U. S. C. C., 1881). The restriction upon the power of a State to tax the shares of any national bank within its borders "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State" (Rev. Stat., sec. 5219) is intended to secure equality of valuation in the assessment of the stock, as well as equality in the rate of the tax after the assessment has been made. (*Albany City National Bank v. Maher, receiver, etc.*, 6 Fed. Rep., 417.)



## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

- 36 (U. S. C. C., 1881). An act for the taxation of corporations generally does not exempt individuals from assessment or taxation upon their personal property or moneyed capital invested in the shares of such corporations. (Ib.)
- 37 (U. S. C. C., 1881). Therefore the imposition of a higher assessment and heavier tax upon the shares of a national bank than those imposed upon the capital stock and personal property of other corporations within the State does not contravene section 5219 of the Revised Statutes. (Ib.)
- 38 (U. S. C. C., 1886). If the taxation laws of a State subject to taxation the capital stock of certain corporations, but exempt the shares held by the several stockholders, while the shares of national-bank stock are subject to taxation in the hands of the shareholders, but the capital stock itself is exempt, *held*, that there is here no such discrimination against capital invested in national banks as to run counter to the provisions of Revised Statutes, United States, section 5219. (*Mercantile National Bank of City of New York v. Mayor, etc., of City of New York* and another, 28 Fed. Rep., 776.)
- 39 (U. S. C. C., 1886). The exemption from taxation by the laws of New York of shares of life-insurance companies, of stocks and bonds of New York City, of bonds of other State municipalities, and of deposits in savings banks is justified by public policy and does not indicate any unfriendly discrimination on the part of the State as between the shares of national banks and moneyed capital generally. (Ib.)
40. The exemption of deposits in savings banks does not affect the rule for taxation of shares of national banks, because it is not like other property similarly invested.
  - (U. S. Sup. Ct., 1887) *Davenport National Bank v. Davenport*, 123 U. S., 83;
  - (U. S. Sup. Ct., 1888) *National Bank of Redemption v. Boston*, 125 U. S., 60;
  - (U. S. Sup. Ct., 1890) *Palmer v. McMahon*, 133 U. S., 660;
  - (U. S. Sup. Ct., 1887) *Mercantile National Bank v. New York*, 121 U. S., 138.
- 41 (Ala.). And a State tax upon shares in national banking associations is not rendered invalid by an exemption of the shares of other corporations, the capital of which consists of property required to be listed for taxation as such. (*McIver v. Robinson*, 53 Ala., 456.)
- 42 (Ind., 1874). State banks were exempt from taxation under a statute passed prior to the national banking act. *Held*, that shares in national banks could nevertheless be taxed. (*City of Richmond v. Scott*, 48 Indiana, 568; 1 N. B. C., 445.)
- 43 (Ind., 1874). A tax was levied on money belonging to plaintiff on the 1st day of January. In March he bought with this money shares in the stock of a national bank. *Held*, that the shares could be also assessed under a statute providing that persons should be assessed for bank stock held by them on April 1. (Ib.)
- 44 (Wash., 1894). A case of discrimination against national banks, within the purview of section 5219, Revised Statutes United States, arises only when the moneyed capital employed in the hands of individual owners in carrying on operations of the same character as those by national banks is some considerable amount and is exempt by operation of law or by the willful act of the assessors. (*Washington National Bank of Seattle v. King County, Wash.*, 38 P., 219; 9 Wash., 607; *Commercial National Bank v. Same, ib.*; *Washington National Bank v. City of Seattle, ib.*; *Commercial National Bank v. Same, ib.*; *First National Bank v. Same, ib.*; *Boston National Bank v. Same, ib.*; *National Bank of Commerce v. Same, ib.*; *Puget Sound National Bank v. Same, ib.*; *Seattle National Bank v. Same, ib.*)

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

*Effect of exemption of trust companies and savings banks.*

- 45 (U. S. Sup. Ct., 1902). No discrimination against national banks in violation of United States Revised Statutes, section 5219, providing that taxation on their shares of stock shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, is made by the system of taxation prevailing in New York in respect to trust companies, since it must be presumed that if such companies are using their funds in a strictly banking business under an assumption of powers not in fact conferred by law, the State will take proper steps to keep them within the statutory limits, and a neglect for a limited time to do so can not be considered as an assent by the State to such an improper assumption of power. (*Jenkins v. Neff*, 186 U. S., 230.)
- 46 (U. S. Sup. Ct.). The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to tax shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.  
(U. S. Sup. Ct., 1887) *Mercantile National Bank v. New York*, 121 U. S., 138;  
(U. S. Sup. Ct., 1890) *Palmer v. McMahon*, 133 U. S., 660.
- 47 (U. S. Sup. Ct.). Although trust companies in New York are not banks in the commercial sense, the shares of stock held by individuals therein are moneyed capital, within United States Revised Statutes, section 5219. (Ib.)

*Effect of exemption of choses in action.*

- 48 (U. S. Sup. Ct., 1874). Municipal and school taxes may be levied upon the shares of a national bank, although mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation except for State purposes in the borough where the bank is located. (*Hepburn v. School Directors of Carlisle*, 23 Wall., 480.)
- 49 (Wash. Sup., 1893). The nontaxation of credits of individuals, such as accounts, promissory notes, and mortgages, is not unlawful discrimination against national banks whose capital is taxed. (*First National Bank of Aberdeen v. Chehalis County et al.*, 32 P., 1051; 6 Wash., 64.)
- 50 (Wash. Sup., 1893). Revised Statutes United States, section 5219, which prohibits the legislature of each State from taxing national-bank stock at a greater rate than assessed upon the "moneyed capital" in the hands of individual citizens of the State, is intended merely to prevent moneyed capital invested in national banks from being placed at a disadvantage as compared with moneyed capital in the hands of citizens of the State, used for practically an identical purpose with that invested in the stock of national banks; and the nontaxation of credits owing to individual citizens, such as accounts, promissory notes, and mortgages, is not an unlawful discrimination against national banks whose capital is taxed. (Ib.)

*No discrimination in assessment allowed.*

- 51 (U. S. Sup. Ct., 1879). Any system of assessment of taxes which exacts from the owner of the shares of a national banking association a larger sum in proportion to the actual value of those shares than it does from other moneyed capital, valued in like manner, taxes the shares at a greater rate, notwithstanding that the percentage of tax on the valuation is the same as that applied to other moneyed capital. (*Pelton v. Commercial National Bank*, 101 U. S., 143.)
- 52 (U. S. Sup. Ct., 1879). Where shares in national banking associations are purposely valued proportionately higher than the other moneyed capital in the State, the assessment is void. (Ib.)

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

- 53 (U. S. Sup. Ct., 1879). And the collection of what is in excess of the rate imposed on the other moneyed capital may be enjoined. (Ib.)
- 54 (U. S. Sup. Ct., 1887). A State statute creating a system of taxation of banks which does not discriminate against national banks is not unconstitutional. (*Davenport National Bank v. Davenport*, 123 U. S., 83.)
- 55 (U. S. Sup. Ct., 1887). Section 5219, Revised Statutes, does not require perfect equality between State and national banks, but only a system of taxation which shall work no discrimination between them. (Ib.)
- 56 (U. S. Sup. Ct., 1888). The auditor of Cuyahoga County, Ohio, fixed the taxable value of shares in a national bank at 60 per cent of their true value in money, in accordance with the practice adopted for the valuation of other moneyed capital of individuals in the courts and State, and transmitted the same to the State board of equalization for incorporated banks. That board increased the valuation to 65 per cent, and this value, being certified back to the auditor, was placed by him on the tax list without a corresponding change being made in the valuation of other moneyed capital of individuals. *Held*, that this was such a discrimination as is forbidden by section 5219 of the Revised Statutes of the United States. The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his *bona fide* indebtedness made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained. *Held*, (1) that the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital; and (2) that the right to it is not lost by not making a demand for it until the entire process of appraisal and equalization of the value of the shares for taxation is completed and the tax duplicate is delivered to the treasurer for collection. (*Whitbeck v. Mercantile National Bank of Cleveland*, 127 U. S., 193.)
- 57 (U. S. Sup. Ct., 1887). A county assessor assessed the stock of all the banks in the county, both State and national, at the par value. The actual value of the shares of the National Albany Exchange Bank was from twenty-five to thirty per cent above par. The actual value of the shares of all the banks in the county, with one exception, was above par from ten to over one hundred per cent. In a suit by a shareholder of said national bank to recover the amount paid upon his stock on the ground of discrimination, *held*, that the discrimination not being designed by the assessor, the assessment was valid. (*Williams v. Board of Supervisors of the County of Albany*, 122 U. S., 154; 3 N. B. C., 278.)
- 58 (U. S. Sup. Ct., 1887). Where the assessors are required by statute to complete the assessment roll by a certain date, and to make oath to it in a prescribed form, and these requirements are necessary to enable notices to be published specifying a time when they would meet to review the assessments on the application of any person aggrieved, the noncompletion of the assessment roll by the specified date, and departure from the prescribed form of oath, may be cured by remedial statute subsequently enacted, providing the right of the taxpayers aggrieved by the assessment to have their objections passed upon is saved. (Ib.)
- 59 (U. S. Sup. Ct., 1888). Under Public Statutes of Massachusetts, chapter 13, section 8, which provides that all bank shares shall be assessed at their cash value, and at no greater rate than other moneyed capital in the hands of citizens, taxes are not invalid, either under statutes of Massachusetts or United States Revised Statutes, section 5219, because the tax on savings banks is based on the amount of their

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

- deposits, excepting deposits invested in loans secured on taxable real estate. (*National Bank of Redemption v. City of Boston*, 125 U. S., 60; 3 N. B. C., 300.)
- 60 (U. S. Sup. Ct., 1888). A tax levied under Public Statutes of Massachusetts, chapter 13, section 8, is not "at a greater rate than other moneyed capital in the hands of citizens" because disproportionate and unequal to the tax imposed under Public Statutes of Massachusetts, chapter 13, relative to the taxation of the corporate franchise of corporations, excepting banks; on life insurance companies, based on the number of policies; on trust and like companies, based on the amount of deposits, and on telephone companies, based on the number of telephones used. (Ib.)
- 61 (U. S. Sup. Ct., 1899). Under the Ohio system of taxation there is not an unfavorable discrimination against national bank shareholders and in favor of unincorporated banks or bankers in assessing the value of capital employed in business, as in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual simply as an individual be deducted from the value of the capital assessed for taxation. (*First Nat. Bank of Wellington, Ohio, v. Chapman, Treasurer of Lorain County, Ohio*, 1 Banking Cases, 325; 173 U. S., 205.)
- 62 (U. S. C. C., 1886). If it appears that the capital represented by national-bank shares is subjected in a State to a higher rate of taxation than is assessed upon the moneyed capital generally of the taxpayers, there can be no valid assessment of national-bank shares for taxation in that State, and these shares will be relieved from any contribution whatever to the general burden of taxation under Revised Statutes United States, section 5219. (*Mercantile National Bank of the City of New York v. Mayor, etc., of City of New York* and another, 28 Fed. Rep., 776.) (*As to what constitutes moneyed capital, see Mercantile Bank v. N. Y., No. 27 ante, page 515.*)
- 63 (U. S. C. C., 1893). Section 5219 prohibits an adverse discrimination by a local government in the valuation of national-bank stock for assessments as compared with an assessment by the same government for the same year of other moneyed capital invested so as to make a profit from the use thereof as money. (*Puget Sound National Bank of Seattle v. King County et al.*, 57 Fed. Rep., 433.)
- 64 (Ill.). The provision of the act of June 13, 1867, requiring the assessment of shares in banks to be made for the year 1867, with regard of the 1st day of July, 1867, instead of the first day of the preceeding April, does not violate the principle of equality and uniformity established by the Constitution. (*McVeagh v. City of Chicago et al.*, 49 Ill., 318.)
- 65 (Mont., 1887). Shares of national banks in the Territories are taxable like other personalty. (*Commissioners of Silverbow County v. Davis*, 6 Mont., 306; 3 N. B. C., 546.)
- 66 (Mont., 1887). In Montana stocks or shares in any bank or company are taxable except where the entire capital stock is invested in property assessable in the Territory; in Silverbow County mining claims not patented were not taxed, and when patented were assessed at \$5 an acre; the entire capital of a large number of mining companies was assessable, and part of their property was mining claims; defendant's shares of bank stock were assessed at the market value. *Held*, that there was no discrimination. (Ib.)
- 67 (Wash. Sup., 1899). A constitutional provision requiring "a uniform and equal rate of assessment and taxation" does not necessarily require uniform methods of assessment. (*Pacific Nat. Bank of Tacoma v. Pierce County et al.*, 2 Banking Cases, 293; 20 Wash., 675.)

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

*Valuation of shares.*

- 68 (U. S. Sup. Ct., 1879). The provision that State taxation on the shares of any national bank shall not be at a greater rate than assessed on other moneyed capital includes the valuation of the shares, as well as the rate of percentage charged thereon. (*New York v. Weaver*, 100 U. S., 539.)
- 69 (U. S. Sup. Ct., 1881). The shares of national banks are taxable with exclusive reference to their value and without regard to the nature of the property held by them as corporations. (*Evansville National Bank v. Britton*, 105 U. S., 322.)
- 70 (U. S. Sup. Ct.). The uniform valuation of shares of national and State banks at par, although the actual value of the shares differ, is not in violation of the banking act, as it constitutes no discrimination against banks of either kind.  
(U. S. Sup. Ct., 1887) *Williams v. Albany Co.*, 122 U. S., 154;  
(U. S. Sup. Ct., 1887) *Stanley v. Albany Co.*, 121 U. S., 535.
- 71 (U. S. Sup. Ct., 1876). Under the statute of New York, shares in national banking associations should be taxed at their real or market value. (*People v. The Commissioner of Taxes and Assessments*, 94 U. S., 415.)
- 72 (U. S. Sup. Ct., 1874). The shares may be valued for taxation at an amount exceeding their face value if this amount is not at a greater rate than the valuation set upon other moneyed capital in the State. (*Hepburn v. School Directors*, 23 Wall., 480.)
- 73 (U. S. C. C., 1876). In estimating the value of the shares for the purpose of taxation, reference may be had to all the property and values of the bank. (*St. Louis National Bank v. Papin*, 3 Cent. L. J., 669; 1 N. B. C., 326.)
- 74 (U. S. C. C., 1876). If no excessive valuation is complained of, and a correct result is arrived at, equity will not restrain the collection of a tax because the method of computation was erroneous. (Ib.)
- 75 (U. S. C. C.). National-bank shares can not be included in the valuation for taxation by or under State authority at more than the par value thereof; the par value is the fixed value for taxation. (*Union National Bank v. City of Chicago*, 3 Biss., 82.)
- 76 (N. Y. App., 1877). In assessing shares of stock in national banks in New York the assessors must determine the actual value of the shares, taking into consideration all the capital of the bank, whether surplus or in real estate or otherwise, and then deduct from such value such sum as represents the proportion which the assessed value of the real estate bears to the assessed value of the entire capital. (*People ex rel. Tradesmen's National Bank v. Commissioners of Taxes and Assessments*, 1 N. B. C., 752.)
- 77 (N. Y. App., 1877). Thus the capital of a national bank was \$1,000,000, and was represented by 25,000 shares of \$40 each. The assessors assessed the shares at \$56 each, making in the aggregate \$1,400,000, and the real estate at \$200,000. *Held*, that they should deduct from the assessed value of each share \$8, being one-seventh, or the proportion which the real estate bore to the aggregate assessed value of the shares. (Ib.)

*Ohio—Increase of valuation without notice.*

- 78 (U. S. Sup. Ct., 1902). This suit was brought in the circuit court of the United States for the northern division of Ohio, eastern district, to restrain the collection of certain taxes levied by the officers of Cuyahoga County, Ohio, upon the appellee bank. The grounds of the suit were that the acts of the taxing officers of said county were in violation of the "rights of the plaintiff (appellee) and of its shareholders accorded to them by section 5219 of the Revised Statutes of the United States, securing to said shareholders a restriction of the rate and limit of taxes assessed upon their said shares to that

## TAXATION—Continued.

## ASSESSMENT OF SHARES—continued.

assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio." The bill alleged that the plaintiff (appellee) was a national bank, and stated the capital stock of the bank and the number of shares into which it was divided; that its cashier made the proper returns of the resources and liabilities of the bank to the county auditor; that the latter fixed the value thereof, as required by section 2766 of the Revised Statutes of the State, after deducting the assessed value of the real estate of the bank, and transmitted a statement of his action, and a copy of the report made by the cashier to the State board of equalization for incorporated banks, and that board, professing to act under sections 2808 and 2809 of the Revised Statutes of the State, increased the valuation of the shares without notice to the bank or its shareholders, and that the board was hence without jurisdiction to make such increase, and "its action in respect thereto was void and of no effect." It was averred "that said State board of equalization knowingly and designedly did fix a much higher per centum of valuation and assessment for taxation upon the shares of the plaintiff's capital stock than was assessed upon other moneyed capital in the hands of individual citizens of the State of Ohio, and much higher than that fixed on other moneyed capital in the hands of such citizens in said county of Cuyahoga and said city of Cleveland." After the answer was filed, the case was referred to a master, and upon the coming in of his report, and, after considering the exceptions of the parties to it, the court dissolved the injunction which had been granted and dismissed the bill. That action was reversed by the circuit court of appeals and the cause remanded, with instructions to enter a decree in favor of the complainant (appellee here). Thereupon an appeal was taken. *Held*, that the judgment of the court of appeals should be reversed, and the judgment of the circuit court should be affirmed. (*Lander v. Mercantile Bank*, 186 U. S., 458.)

## COLLECTION OF TAX.

*Bank's property may not be seized for tax on shares.*

- 1 (Iowa, 1870). A collector of taxes has no authority to seize the property of a national bank to satisfy a tax assessed against a shareholder. (*First National Bank v. Hershire*, 31 Iowa, 18; 1 N. B. C., 465.)
- 2 (N. Y. Appls., 1872). A warrant for the collection of a tax assessed to the shareholders on shares of stock in a national bank directed the collector "to levy the same on the goods and chattels of such persons." *Held*, that the collector could not thereon seize the property of the bank to pay the tax. (*First National Bank of Sandy Hill v. Fancher*, 48 New York, 524; 1 N. B. C., 697.)

*Bank not liable for tax on shares unless it has dividends.*

- 3 (Iowa, 1870). Under the statute of Iowa a national bank is not liable for the tax assessed against a shareholder unless it have in its possession dividends or property belonging to such shareholder. (*Hershire v. The First National Bank*, 35 Iowa, 272; 1 N. B. C., 476.)

*Bank may be garnisheed for taxes against stockholders.*

- 4 (Wash. Sup., 1893). The State has a right to resort to the bank as a garnishee for the collection of its claims against stockholders for taxes, and legislation may require assessment of stock to be made to the bank *in solido*. (*First National Bank of Aberdeen v. Chehalis County et al.*, 32 P., 1051; 6 Wash., 64.)

## INJUNCTION.

*Bank may enjoin collection of unequal tax on shares.*

1. Where the tax on shares is collected from the association it may bring a suit to enjoin the collection of an illegal tax.  
(U. S. Sup. Ct., 1879) *Merchants' National Bank of Toledo v. Cumming*, 101 U. S., 153;

## TAXATION—Continued.

## INJUNCTION—continued.

- (U. S. Sup. Ct., 1879) *Pelton v. Commercial National Bank*, 101 U. S., 143;
- (U. S. Sup. Ct., 1884) *Boyer v. Boyer*, 113 U. S., 689.
- 2 (U. S. Sup. Ct., 1881). Bank may, on behalf of stockholders, maintain suit to enjoin collection of State tax unlawfully assessed on shares. (*Hills v. National Albany Exchange Bank*, 105 U. S., 319.)
- 3 (U. S. Sup. Ct., 1879). The constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital, and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the county boards. Throughout a large part of the State of Ohio, including Lucas County, in which the plaintiff bank is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at six-tenths its true value. The State board of equalization of bank shares increased the valuation of these shares to their full value. This court holds: (1) That the act creating the board for equalizing bank shares is not void as a violation of the constitution of Ohio, because if the local assessors would discharge their duty by assessing *all property* at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a law can not be held to be unconstitutional which in itself does not conflict with the constitution because of the injustice produced by its maladministration; (2) the rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with the constitution and works manifest injustice to the owners of bank shares; (3) when a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment which is intended to operate unequally, in violation of the fundamental principles of the constitution, and when this principle is applied not solely to one individual but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power; (4) the appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess. (*Merchants' National Bank of Toledo v. Cumming*, 101 U. S., 153.)
- 4 (U. S. C. C. A., 1900). A national bank may maintain a suit in a Federal court to enforce the right given by Revised Statutes of Ohio, section 5848, to enjoin the collection of taxes levied on an illegal assessment. (*Mercantile Nat. Bank of Cleveland v. Hubbard*, County Treasurer, 3 Banking Cases, 130; 105 Fed. Rep., 809.)
- 5 (Ind. Sup., 1894). Banks may sue to enjoin collection of an illegal tax assessed against them on their stock. (*Jones v. Rushville National Bank*, 37 N. E., 338; *Conzman v. First National Bank*, ib., 392; 138 Ind., 87.)
- 6 (Wash. Sup., 1900). Under 2 Ballinger's Annual Codes and Statutes, section 4825, authorizing a trustee of an express trust to bring suit in his own name without joining the person for whose benefit the suit was brought, a national bank may bring suit for relief against an excessive tax on its stock without joining its stockholders, since a trust is imposed on the bank for the payment of such taxes. (*Citizens' Nat. Bank of Dayton v. Columbia County et al.*, 3 Banking Cases, 660; 23 Wash., 441.)

## TAXATION—Continued.

## INJUNCTION—continued.

*Injunction against collection of taxes.*

- 7 (U. S. C. C., 1897). A Federal court will enjoin a sale of real estate of a national bank to enforce payment of taxes illegally assessed against its capital stock, under a law which would make the sale a cloud on its title, though the State law gives an action at law to recover back taxes illegally exacted. (*Brown v. French*, 80 Fed. Rep., 166.)

*Illegal assesment—Statutory remedy by injunction.*

- 8 (U. S. C. C. A., 1902). The remedy given by Rev. St. Ohio, section 5843, expressly authorizing suits to enjoin the illegal levy of taxes or assessments or the collection thereof, may be enforced on the equity side of the Federal courts. (*Lander v. Mercantile Nat. Bank*, 118 Fed. Rep., 785.)

*Collateral attack of assessment in suit for taxes.*

- 9 (U. S. Sup. Ct., 1889). P. was a resident in the city of New York and a stockholder in a national bank situated there. In 1881 his shares in the bank were assessed at a valuation of \$247,635. This valuation was entered by the tax commissioners in the annual Record of Valuations for 1881, a book which was kept open for public inspection from the second Monday of January, 1881, to May 1, 1881, and a public advertisement thereof was made. Before April, 1881, P. appeared before the commissioners and claimed a reduction, and they reduced the valuation to \$190,635. On May 1 the assessment rolls were prepared from that record, with the valuation of P.'s shares at the latter sum, and he was assessed at that valuation. The tax rolls were completed on this basis, and notice was given that they would be open for inspection. P.'s tax, upon the reduced valuation, was \$4,994.63. The tax rolls were confirmed, and due notice was given to all taxpayers that the taxes were due and payable. P. paid \$1,310 of this tax, but declined to pay the further sum of \$3,684.63. The collector of taxes thereupon proceeded against him in the court of common pleas for the city and county of New York, under chapter 230 of the laws of New York of 1843, for the enforcement of the payment of the sum remaining due. He appeared and answered, and judgment was given against him, which judgment was affirmed by the court of appeals, and the case was remanded to the court of common pleas. A writ of error was sued out from this court to review that judgment. *Held*, (1) that this court was bound by the decision of the court of appeals as to P.'s failure to comply with the State statute in relation to the method of procedure, form of assessment, etc.; (2) that the assessment was not made in contravention of the Constitution or laws of the United States, and was, therefore, not void for that reason; (3) that the mode provided by the statute of New York for the collection of the tax was "due process of law," and did not deprive P. of the equal protection of the laws, but that it was a purely executive process to collect the tax after the liability of the party was finally fixed. When a law provides a mode for confirming or contesting an assessment for taxation, with appropriate notice to the person charged, the assessment can not be said to deprive the owner of his property without due process of law. Assessors should give all persons taxed an opportunity to be heard; but it is sufficient if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which, and the place where, such complaints may be made. (*Palmer v. McMahon*, 133 U. S. Reports, 660.)
- 10 (Mont., 1895). Where the assessor made an unauthorized assessment of the shares of bank stock to the bank, and the bank did not ask the board of equalization to correct such erroneous assessment, it could not enjoin the collection of the taxes, in the absence of a valid excuse for its failure to apply to such board. (*First National Bank of Missoula v. Bailey*, 39 P., 83; 15 Mont., 301.)



## TAXATION—Continued.

## INJUNCTION—continued.

- 11 (Mont., 1895). Where bank stock is erroneously assessed to the bank instead of the stockholders the board of equalization may correct the assessment. (Ib.)
- 12 (Wash. Sup., 1900). Where an assessor states to the officers of a national bank, when it presents its list of stock to him for taxation, that such stock will be assessed at a certain value, but he assesses it at a higher value, and the bank is given no notice thereof, it may maintain an action for relief against such excessive valuation, though it does not go before the board of equalization and ask for a reduction, since the act of the assessor was a fraud on the bank. (*Citizens' Nat. Bank of Dayton v. Columbia County*, 3 Banking Cases, 660; 23 Wash., 441; 63 Pac. Rep., 209.)

*When illegal taxes can not be recovered, may be enjoined.*

- 13 (U. S. C. C., 1873). Where there is no means of recovering back from the State taxes illegally assessed and paid into the treasury, a court of equity will enjoin their collection; and when both State and county taxes are included in one warrant, and are for a common reason illegal, the court will at the same time determine the validity of both the State and county taxes. (*First National Bank of Omaha v. County of Douglas*, 1 N. B. C., 267; 3 Dillon, 298.)
- 14 (U. S. C. C., 1873). State authorities will be enjoined from collecting a tax on the capital stock of a national bank invested in United States securities. (Ib.)

*When property assessed below cash value.*

- 15 (U. S. Sup. Ct., 1893). When the statute requires property to be assessed for taxation at its cash value, a bill to enjoin the collection of a tax solely on the ground that the property of other persons is assessed below its cash value can not be maintained by a person whose property is also assessed below that value. (*Albuquerque National Bank v. Perea*, 147 U. S., 87.)

*When State board acts without an appeal.*

- 16 (Ind. Sup., 1893). Where the State board of tax commissioners raised the assessment on plaintiff's property without an appeal from the county board of review, the action was void and the collection of the tax on the increased value should be enjoined. (*First National Bank v. Brodhecker*, 37 N. E., 340; 137 Ind., 693.)

*Injunctions not granted for irregularities of officers.*

- 17 (U. S. C. C., 1881). The failure of the assessors to place the names of the shareholders upon the assessment roll, in accordance with the requirement of the State statute, renders such tax illegal and void, although a separate list, with the knowledge of the shareholders, was kept by such assessors, showing the names of all such shareholders, with the number of shares held by each, and the assessable value of all such shares. (*Albany City National Bank v. Maher, Receiver, etc.*, 6 Fed. Rep., 417.)
- 18 (U. S. C. C., 1881). The collection of such tax will not, however, be enjoined upon the application of a shareholder upon the mere ground of such illegality. (Ib.)
- 19 (U. S. C. C., 1881). In order to prevent a multiplicity of suits, however, the collection of such tax will be enjoined upon the application of the bank, where the latter is required by the statute under which the assessment was made to retain so much of any dividend or dividends belonging to such shareholders as shall be necessary to pay any taxes assessed in pursuance of the act. (Ib.)
- 20 (Kans., 1894). The collection of taxes which plaintiff ought to pay will not be restrained for mere irregularities by the taxing officers. (*Dutton v. Citizens' National Bank of Concordia*, 36 P., 719; 53 Kans., 440; *Same v. First National Bank*, 36 P., 724; *First National Bank v. Ayers*, 36 P., 724; 53 Kans., 463.)

## TAXATION—Continued.

## INJUNCTION—continued.

*Injunction will not lie while any valid tax unpaid.*

- 21 (U. S. Sup. Ct., 1881). A court of equity will not enjoin the collection of a local tax upon national-bank shares on the ground that the assessment is partial, unequal, and unjust, as compared with that upon other property, there being no offer to pay any tax, and the effect of an injunction being to declare the whole tax of a State for the year void. (*German National Bank of Chicago v. Kimball*, 103 U. S., 732; 3 N. B. C., 9.)

*When two banks can not join in action.*

- 22 (Ind. Sup., 1894). Two banks, against whose stock illegal taxes have alike been separately assessed, can not join in a suit to enjoin the collection. (*Jones v. Rushville National Bank*, 37 N. E., 338; *Conzman v. First National Bank*, ib., 392; 138 Ind., 87.)

*Excessive assessments.*

- 23 (U. S. Sup. Ct., 1887). Excessive assessments should be corrected by the statutory course or by injunction. (*Stanley v. Board of Supervisors of the County of Albany*, 121 U. S., 535; 3 N. B. C., 268.)

*Tax must be illegal and extraordinary relief necessary.*

- 24 (U. S. C. C., 1901). A Federal court will not enjoin the collection of taxes levied under the authority of a State upon the shares of a national bank, unless it clearly appears not only that the tax is illegal, but also that there are special circumstances which bring the case within some recognized ground of equity jurisdiction, and render such relief necessary to the adequate protection of the complainant's rights. (*People's Nat. Bank of Lynchburg v. Marye*, Auditor of Public Accounts; *First Nat. Bank of Lynchburg v. Same*; *Lynchburg Nat. Bank v. Same*; *National Exch. Bank of Lynchburg v. Same*, 107 Fed. Rep., 570.)

- 25 (U. S. C. C., 1901). A bank can not maintain a suit in equity on behalf of its shareholders to enjoin the collection of taxes levied on their shares where the shareholders themselves could not maintain such suit, and where the statute under which the taxes are levied imposes no duty or liability on the bank in respect to the same. (Ib.)

- 26 (U. S. C. C., 1901). Act Virginia, March 6, 1890, providing for the taxation of bank shares, required the banks to pay the taxes levied thereunder against their stockholders, and provided that, in case a bank failed to make such payment within a certain time, the cashier and his sureties should be liable therefor, with an added penalty, to be recovered at suit of the State. Act March 3, 1896, providing for the collection of delinquent taxes on bank shares, left it optional with a bank to pay such taxes levied against its stockholders, and provided that, in case it did not elect to make such payment after notice, suits should be instituted for the collection of the same from the stockholders individually. *Held*, that whether the latter act be regarded as repealing the provision of the one under which the taxes were levied, authorizing suit against the cashier, or as merely providing a cumulative remedy, a national bank could not maintain a suit to enjoin the officers of the State from proceeding to collect such taxes, upon an allegation that the statute imposing the same was discriminative and invalid, under the laws of the United States, as applied to national-bank shares, where it was not alleged that any action was threatened or contemplated against the bank itself, since, in suits against the stockholders under the later act, they had full opportunity to make any defense, and neither they nor the bank in their behalf had any ground for injunction. (Ib.)

- 27 (U. S. C. C., 1901). The jurisdiction of equity on the ground of preventing a multiplicity of suits can be invoked only where such suits will be against the same person, and a bank can not maintain a suit on that ground to enjoin separate suits against its stockholders for the collection of taxes levied upon their shares. (Ib.)

## TAXATION—Continued.

## INJUNCTION—continued.

- 28 (U. S. C. C., 1901). Where a statute providing for the taxation of bank shares imposes duties and liabilities on the bank, as by requiring it to withhold dividends from its stockholders and apply the same to the payment of the taxes on their stock, and subjecting it to heavy penalties for a failure to comply with such requirements, it may maintain a suit in equity on behalf of its stockholders to test the validity of such statute and to enjoin its enforcement if found invalid. (Ib.)
- 29 (U. S. C. C., 1901). A statute imposing taxes upon bank shares is not invalid because it requires the assessment of such shares at their market value without making any deduction on account of the real estate owned by the bank, which is separately taxable—the shares being the property of the stockholder, while the real estate is the property of the corporation; nor can such statute be held discriminative and invalid under Revised Statutes, section 5218, as to national-bank shares, where it applies to all banks. (Ib.)
- 30 (U. S. C. C., 1901). That the statutes of a State permit a taxpayer to deduct the amount of his indebtedness from the amount of all bonds, notes, and other evidences of debts which he is required to return for taxation does not render the assessment of national-bank shares at their market value without allowing the holder to deduct his indebtedness an unlawful discrimination against such shares, and in favor of moneyed capital, under Revised Statutes, section 5219, where the same rule of assessment applies to all bank shares. (Ib.)
- 31 (U. S. C. C., 1901). A statute providing for the taxation of bank shares which requires the banks themselves to make returns showing the market value of their shares, and itself fixes the rate of tax which shall be levied on such valuation, is not unconstitutional as depriving the shareholders of their property without due process of law, although it provides for no notice to them of the assessment or opportunity to be heard thereon, and makes the tax bills self-executing and enforceable by levy without suit, since no judicial act is done by any officer in relation to such assessment, and no action is taken after the return is made by the bank which could in any way be affected by a notice or hearing. (Ib.)

## STATE AND FEDERAL STATUTES CONSTRUED.

*Section 41 of national banking act.*

- 1 (U. S. Sup. Ct., 1897). Section 41 of the national banking act imposing certain taxes upon the average amount of the notes in circulation of a banking association, now found in the Revised Statutes, is not a revenue bill within the meaning of the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." Whether in determining such a question the courts may refer to the Journals of the two Houses of Congress for the purpose of ascertaining whether the act originated in the one House or the other is not decided. (*Twin City Bank v. Nebeker*, 167 U. S., 196.)

*California.*

- 2 (U. S. Sup. Ct., 1905). Section 5219 Revised Statutes, authorizes the taxation by the States of shares of stock of national banks, but exacts that the tax when levied shall be at no greater rate than that imposed on other moneyed capital; no conflict necessarily arises between the Federal statute and a State law solely because the latter provides one method for taxation of State banks and another method for national banks if there is no actual discrimination against the shares of the national banks resulting from the difference in method. If, however, irrespective of the face of the law, the system created by the State law in its practical execution produces an actual and

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

material discrimination against national banks, it does conflict with section 5219, Revised Statutes, and is void. The Chief Justice and Justices Brewer, Brown, and Peckham dissenting. (*San Francisco National Bank (Nevada National Bank of) v. Dodge*, 197 U. S. Rep., 70.)

- 3 (U. S. Sup. Ct., 1905). Where the record contains an express admission that a specified instance of taxation showing an undervaluation of the property of a corporation is illustrative of the method by which all other similar institutions are assessed under a statute requiring full valuation, this court can not disregard the admission and consider that such undervaluation is an isolated instance, and that all the property of other similar institutions is assessed at full value in accordance with the provisions of the statute. (Ib.)
- 4 (U. S. Sup. Ct., 1905). As it appears from the agreed statement of facts in this case that under the laws of California, as construed by the highest court of that State, all the elements of value which are embraced in the assessment of shares of stock in national banks are not included in assessing the value of property of State banks and other moneyed corporations, there is a discrimination against the shares of national banks, and the State law taxing such shares as so construed violates, and is void under section 5219, Revised Statutes. (Ib.)
- 5 (Cal. Sup., 1881). The provision of section 3640 of the California Political Code, as amended March 22, 1880, so far as it applies to national banks, is in violation of section 5219, United States Revised Statutes, forbidding the taxation of national bank shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. (*Miller v. Heilbron*, 58 Cal., 133; 3 N. B. C., 330.)

*Illinois.*

- 6 (Ill. Super. Ct. Cook Co., 1877). The statute of Illinois provided that the stockholders in banks, whether State or national, should be assessed on the value of their shares in the county, town, district, village, or city where the bank was located, whether such stockholder resided there or not, but not at a greater rate than was assessed on other moneyed capital where such bank was located; that each bank should keep a list of the names, residences, and number of shares of each shareholder, which should be open to the inspection of the revenue officers; that the assessors should ascertain and report to the county clerk a correct list of the names and residences of all stockholders, with the number and assessed value of their shares; that the county clerk should enter the assessed valuation of such shares in the tax list and compute and extend the taxes thereon; that such tax should be a lien on the shares, and that the bank officers should retain the dividends on such stock until the tax was paid. *Held*, constitutional. (*Nickerson v. Kimball*, 1 N. B. C., 409; 1 Chicago Law Journal, 42.)
- 7 (Ill. Super. Ct. Cook Co., 1877). Under the statutes of Illinois anyone may complain to the board of equalization that another is assessed too low, but such complaint is not to be acted upon until the person so assessed or his agent has been notified of such complaint, if a resident of the county, and no error or formality in the proceedings of any of the officers connected with the assessment, levying, or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. *Held*, (1) that notice of the complaint to the person assessed was not essential to give the board jurisdiction; (2) that the bank was the agent of the shareholders, and service of notice on the officers of the bank was sufficient; (3) that the complaint need not specify each person claimed to be assessed too low, but a description of them as "shareholders in" a particular bank was sufficient. (Ib.)

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

- 8 (Ill. Super. Ct. Cook Co., 1877). A national bank alleged that it had been assessed on both its shares of stock and its real estate, and that the value of the real estate was not deducted from the gross value of the stock. It appeared that the aggregate assessed valuation of both the stock and the real estate was less than half their real value. *Held*, that the bank had no cause to complain. (Ib.)
- 9 (Ill.). If in making an assessment under the act the valuation of the shares was determined on the 1st day of July, and the law required it should be determined as of the 1st day of April, it would be necessary for the owner of the shares, calling upon a court of equity for relief, to show that he was injured thereby; that by reason thereof the valuation put upon them on the 1st day of July was greater than they justly bore on the 1st day of April preceding, or that he was compelled to pay a double tax, first on the money listed for taxation on the 1st day of April, and again on the bank shares he purchased with this same money between that day and the 1st day of July. (*McVeagh v. City of Chicago et al.*, 49 Illinois, 318.)
- 10 (Ill.). Where a particular species of property has been omitted from taxation for a given year, the legislature has the power to pass a special law to cure the omission. (Ib.)
- 11 (Ill.). So the tax on national-bank shares, not having been equally assessed for the year 1867, by reason of the defective law under which it was attempted, the act of June of that year was designed to supply the omission, and there was no want of constitutional power to enact it. (Ib.)
- 12 (Ill.). In assessing the shares in national banks under State authority it is not necessary that they shall be included in the personal property, so that upon aggregating the personal property, shares included, the taxable portion would be shown by what remained after the reduction for debts was made, as provided by the general revenue law. It is quite immaterial on what portion of the list these shares are found. (Ib.)
- 13 (Ill.). Under the act of 1867 a system of taxation for bank shares was designed, peculiar to itself and independent of the general revenue system of the State. The only deduction allowed by the act from the shares of each owner is a proportionate sum for the real estate in which a portion of the capital might be invested. No deduction for debts owing by the owner can be made from the valuation of his bank shares. (Ib.)
- 14 (Ill.). Should a collector be compelled to sell the bank shares for the nonpayment of taxes, under the act of 1867, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose, would compel the transfer. (Ib.)
- 15 (Ill.). Or if the taxes upon such shares remain unpaid through the dividends, as provided by this bank, the State could by mandamus compel the officers of the bank to appropriate the dividends or such portions as might be necessary to pay the taxes. (Ib.)
- 16 (Ill.). No actual notice of the assessment of bank shares is required to be given to the owner, the act requiring only that notice shall be published in a newspaper a certain length of time. (Ib.)
- 17 (Ill.). Nor is this discrimination in not allowing a deduction from the valuation of bank shares for debts owing by the owner, as is allowed to be made from the valuation of other personal property under the general revenue law of the State, contrary to the limitations imposed by the provisions of the forty-first section of the national banking act of June 3, 1864, which provides that shares in these banks shall not be taxed under State authority "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

such States." The "rate" of taxation is not affected by the different modes adopted to ascertain the taxable value of the various kinds of property. (Ib.)

*Indiana.*

- 18 (Ind. Sup., 1895). Revised Statutes, 1881, sections 6357, 6358, provide that certain corporations organized under the State laws shall list their stock, and direct the auditor to lay such list before the board of equalization for original valuation. *Held*, that these provisions do not apply to national banks. (*Eaton v. Union County National Bank*, 40 N. E., 693; 141 Ind., 159.)
- 19 (Ind. Sup., 1895). Under tax law, 1891 (Rev. Stat., 1894, sec. 8469), national banks are not required to make the statements therein provided for as a basis for valuation. (Ib.)
- 20 (Ind. Sup., 1870). By an act of the Indiana legislature passed in March, 1867, shares of the capital stock of national banks within the State were taxed for that year, and the cashier of each bank was required to represent each stockholder in listing and valuing his stock. *Held*, that the statute took effect from the 1st day of January, 1867, that it was a valid exercise of the taxing power, and that it did not conflict with the constitutional requirement of "a uniform and equal rate of assessment and taxation." (*Whitney et al., Appellants, v. Ragsdale, Treasurer*, 33 Indiana, 107; 1 N. B. C., 429.)
- 21 (Ind., 1894). Act March 6, 1891, page 199, section 114, empowers the county board of review to equalize valuations and correct lists, fixing true cash values, and after notice equalizing values. Section 125 allows appeals to the State board of tax commissioners, who shall have all the powers conferred on county boards of review. *Held*, that the State board has not original jurisdiction to fix assessments other than its express power over railroad property. (*Jones v. Rushville National Bank*, 37 N. E., 338; *Conzuman v. First National Bank*, ib., 392; 138 Ind., 87.)
- 22 (Ind. Sup., 1871). Under a statute of Indiana, national-bank stock was not taxable for municipal purposes. *Held*, that a tax for school purposes or for a donation by a township to aid in building a railroad was not a tax for "municipal purposes," and therefore not within the restriction. (*Root v. Erdelmeyer*, 37 Indiana, 225; 1 N. B. C., 432.)

*Kentucky.*

- 23 (U. S. Sup. Ct., 1905). A Federal court is not required to give a judgment in a State court any greater weight than is awarded to it in the courts of the State in which it was rendered. As it is the settled rule in Kentucky that an adjudication in a suit for taxes is not an estoppel between the parties as to taxes of any other year, even though such adjudication involves the finding of an exemption by contract, not only as to taxes involved in the suit but also as to all taxes that might be levied under the contract, the Federal courts will not enjoin the collection of taxes for subsequent years on the ground that their invalidity was adjudicated by such a judgment. (*Covington v. First National Bank of Covington*, 198 U. S., 100.)
- 24 (U. S. Sup. Ct., 1905). The statute of Kentucky of March 21, 1900, taxing shares of national banks from the years 1893 to 1900 and thereafter, held void and in conflict with section 5219, Revised Statutes, as to those portions which are retroactive as imposing a burden on the bank not borne by other moneyed corporations of the State, and valid and not in conflict with section 5219 as to taxes imposed thereafter. (Ib.)
- 25 (U. S. Sup. Ct., 1905). A difference in methods in assessing shares of national banks from that of taxing State banks does not necessarily amount to a discrimination, rendering the act invalid under section 5219, and justify the judicial interference of courts for the pro-

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

tection of the shareholders, unless it appears that the difference in method actually results in imposing a greater burden on the national banks than is imposed on other moneyed capital in the State. (Ib.)

*Louisiana.*

- 26 (La. Sup., 1894). It is no ground for annulling an assessment on shares of bank stock under acts 1890, No. 106, section 27, that the list of shareholders appears in a different part of the assessment book from where the amount is noted. (*Castles v. City of New Orleans*, 15 So., 199; 46 La. Ann., 542.)

*Maryland.*

- 27 (U. S. C. C. A., 1900). The fact that bonds and evidences of debt of public or private corporations, and shares of stock in foreign corporations, owned by residents of Maryland, can not be taxed for county or city purposes, under a State statute, at a higher rate than 30 cents on each \$100 of valuation, does not render the taxation of national bank shares for city purposes at a higher rate illegal, under Revised Statutes, 5219, prohibiting the taxation of such shares at a higher rate than other moneyed capital in the hands of individuals, the capital of all domestic banking and other corporations being subject to taxation at the same rate, and it not appearing that the statute, in its practical operation, resulted in relieving the capital of private banking firms from equal taxation. (*National Bank of Baltimore v. Mayor of Baltimore et al.*, 2 B. C., 665; 100 Fed. Rep., 24.)

*Massachusetts.*

- 28 (U. S. Sup. Ct., 1888). Massachusetts laws for taxation of national banks do not deny them the equal protection of the laws guaranteed by the Constitution, nor impose an unequal tax in violation of the constitution of that State. (*Bank of Redemption v. Boston*, 125 U. S., 60.)
- 29 (Mass. Sup., 1869). By the statute of June, 1868, chapter 349, of Massachusetts, entitled "An act concerning the taxing of bank shares," it was provided that the shares in national banks owned by nonresidents of the Commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the 1st day of May." *Held*, that the act was not unconstitutional, either as being in violation of the act of Congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation. (*Providence Institution for Savings and Jewell v. City of Boston*, 101 Mass., 575; 1 N. B. C., 578.)

*Montana.*

- 30 (U. S. Sup. Ct., 1891). National bank stock is not exempt from taxation in Montana because shares of mining stock are exempt. Such stock is assessable at the rate imposed upon the stock of other purely moneyed corporations. (*Talbott v. Silver Bow County*, 139 U. S., 438.)

*New Jersey.*

- 31 (U. S. Sup. Ct., 1887). The New Jersey act of April 11, 1866, section 15, exempts from taxation thereunder corporations which, by virtue of any contract in their charters, or other contracts with this State, are expressly exempted from taxation, except mutual life insurance companies specially taxed, and deposits in savings banks. *Held*, that the assessments of the national banks were not invalid by reason thereof. (*National Newark Banking Co. v. Mayor, etc., of City of Newark*, 3 N. B. C., 265; 121 U. S., 163.)

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

- 32 (N. J. Appls., 1901). By our law, owners of national-bank stock are to be taxed thereon at its true value. Trust companies organized under our law are authorized to engage in business which is in competition with the business of national banks, and are to be taxed to the amount of their capital stock issued and outstanding. (*Mechanics' Nat. Bank of Trenton v. Baker*, Tax Receiver, 3 Banking Cases, 430; 65 N. J. L., 549.)
- 33 (N. J. Appls., 1901). By the true construction of the trust companies' act the tax is to be imposed upon such companies as to the whole number of the shares of stock issued and outstanding, not at their par, but at their real value. (Ib.)

*New York.*

- 34 (U. S. Sup. Ct.). The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed, upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.  
(U. S. Sup. Ct., 1890) *Palmer v. McMahon*, 133 U. S., 660;  
(U. S. Sup. Ct., 1887) *Mercantile National Bank v. New York*, 121 U. S., 138.
- 35 (U. S. Sup. Ct., 1887). Laws of New York, April 23, 1866, chapter 761, providing for the taxation of shares of stock in national banks, is in conflict with the act of Congress (Rev. Stat., sec. 5219) prohibiting such taxation at a greater rate than is imposed by the State upon other moneyed capital in the hands of individual citizens of such State, in so far as it does not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock; but such assessment is not, therefore, invalid unless the stockholder has shown the assessors what his just debts are, and has taken the requisite steps to have his assessment made out in accordance therewith. (*Stanley v. Board of Supervisors of the County of Albany*, 121 U. S., 535; 3 N. B. C., 268.)
- 36 (U. S. Sup. Ct., 1887). The rule adopted by the board of assessors of the city of Albany, to assess all shares of stock in State and national banks in the city of Albany at par, without regard to their actual or market value, but making the requisite reduction for real estate owned by the banks, is not in conflict with the national-bank act. (Ib.)
- 37 (U. S. Sup. Ct., 1881). When the shareholder of a national bank has no debts to deduct the New York act of 1866 provides a mode of assessment for him not in conflict with the act of Congress, and the law in that case is valid. (*Albany Co. v. Stanley*, 105 U. S., 305.)
- 38 (U. S. Sup. Ct., 1881). Where debts exist that ought to be deducted but are not, the assessment is voidable but not void. (Ib.)
- 39 (U. S. Sup. Ct., 1881). The shares of a national bank are not relieved from taxation because a single bank of the State has been favored by mistake or intention. (Ib.)
- 40 (U. S. C. C., 1886). Taxation laws of the State of New York considered, and held to be designed to subject to equality of burden all taxable property, both real and personal, except investments in life insurance companies, deposits in savings banks, the public stocks, and the bonds of the municipalities of the State. (*Mercantile National Bank of City of New York v. Mayor, etc., of City of New York* and another, 28 Fed. Rep., 776.)
- 41 (U. S. C. C., 1886). Section 5219, Revised Statutes of the United States, relating to State taxation of national-bank stock, was not intended to control the power of the State on the subject of taxation, or to prohibit the exemption of particular kinds of property, but to protect the capital invested in national-bank shares from unfriendly discrimination by the States in the exercise of the taxing power. (Ib.)



## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

- 42 (U. S. C. C., 1886). It does not destroy the equality of a State's system of taxation that, in spite of the laws, a part of the moneyed capital of citizens which is invested in forms that enable it to be easily traced does not escape by evasion or oversight, and is consequently more effectually reached and taxed than the bulk of the moneyed capital of individuals. (Ib.)
- 43 (U. S. C. C., 1886). The capital stock of a corporation and the shares held by the several stockholders are distinct species of property for the purpose of taxation—as distinct as real estate and the mortgage by which it may be encumbered. (Ib.)
- 44 (N. Y. Appls., 1886). Section 7 of chapter 302 of the laws of 1859, requiring the deputy tax commissioners to personally examine “each and every house, building lot, pier, and other accessible property,” and furnish the commissioners of taxes a detailed statement of the same, etc., as such commissioners may require, etc., refers only to real property. (In *re McMahon v. Palmer*, 102 N. Y., 176; 3 N. B. C., 636.)
- 45 (N. Y. Appls., 1886). The oath required by the act to be made by the deputy to the statement returned to the commissioners may be taken at any time after examination of the property and before the filing of the statement on the second Monday of January thereafter. (Ib.)
- 46 (N. Y. Appls., 1886). The entry of assessments for national-bank shares upon a list or book separate from other assessments for personal property against individuals in the city of New York does not render the assessment void, and does not violate section 5219, United States Revised Statutes. (Ib.)
- 47 (N. Y. Appls., 1886). The assessment and collection of taxes constitute due process of law within the meaning of the Constitution. (Ib.)

*North Carolina.*

- 48 (N. C. Sup., 1878). A statute empowering the authorities of a town to impose the same taxes for municipal purposes upon nonresidents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a proviso that nonresidents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the State constitution which deprives the nonresident taxpayer of his vote and authorizes a tax upon the shares in a national bank located in the town and held by one who conducts his ordinary business therein, but whose residence is in the county outside the corporate limits. (*Moore v. Mayor and Commissioners of Fayetteville*, 80 N. C., 154; 2 N. B. C., 350; 3 Am. Rep., 75.)

*Pennsylvania.*

- 49 (U. S. Sup. Ct., 1897). The decision of the supreme court of Pennsylvania that the act of June 8, 1891, in respect to the taxation of national banks does not conflict with the constitution of that State is conclusive in this court. (*Merchants and Manufacturers' Bank v. Pennsylvania*, 167 U. S., 461.)
- 50 (U. S. Sup. Ct., 1897). There is no lack of uniformity of taxation under that act which renders it obnoxious to that part of the fourteenth amendment to the Federal Constitution which forbids a State to “deny to any person within its jurisdiction the equal protection of the laws,” as the right of election, which if not availed of by all may produce an inequality, is offered to all. (Ib.)
- 51 (U. S. Sup. Ct., 1897). That act treats State banks and national banks alike, gives to each the same privileges, and there is no discrimination against national banks as such. (Ib.)
- 52 (U. S. Sup. Ct., 1897). The statute, by fixing the time when the bank shall make its report, and directing the auditor-general to hear any stockholder who may desire to be heard, provides “due process of law” in these respects. (Ib.)

## TAXATION—Continued.

## STATE AND FEDERAL STATUTES CONSTRUED—continued.

- 53 (Pa., 1895). Act of June 8, 1891 (P. L., 240), providing that banks paying a certain rate on their shares of capital stock into the State treasury shall be exempt from local taxation, and that banks failing to do so shall be assessed both locally and by the State, at a lower and uniform rate upon the appraised value of their shares, is not repugnant to Constitution, Article IX, section 1, which provides that all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax. (*Commonwealth of Pennsylvania v. Merchants and Manufacturers' National Bank of Pittsburg*, 31 Atl. Rep., 1065; 168 Pa. St., 309.)

*Washington.*

- 54 (U. S. Sup. Ct., 1897). This court is bound by the decision of the supreme court of the State of Washington (in which it concurs), that section 21 of the act of that State of March 9, 1891, relating to the taxation of national banks in that State, is to be read in connection with section 23 of the same act, and that when so read they do not impose upon such banks a tax forbidden by Revised Statutes, section 5219. (*National Bank v. Commonwealth*, 9 Wall., 353, affirmed and followed in this matter. (*First Natl. Bank of Aberdeen v. Chehalis County*, 166 U. S., 440.)

*Taxation in Territories.*

- 55 (U. S. Sup. Ct., 1891). The same power of taxation in respect to national banks exists in the Territories that does in the States. (*Talbott v. Silverbow County*, 139 U. S., 438.)

## TAXATION UNDER WAR-REVENUE ACT.

*Banks—Federal taxation—Undivided profits—Capital.*

- 1 (U. S. C. C. A., 1904). Where a fund accumulated by a bank was carried on its books under the head of "profit and loss" for a period of years, and was used in the bank's business like its other capital, such fund, though not "surplus," should be regarded as an accretion to capital, and was therefore subject to Federal taxation under act of Congress of June 13, 1898, chapter 448, section 2, 30 Statutes, 448 [U. S. Comp. St. 1901, p. 2286], providing that bankers using or employing a capital not exceeding certain amounts shall pay certain Federal taxes, and that, in estimating capital, surplus shall be included. (*Leather Mfrs. National Bank v. Treat*, 128 Fed. Rep., 262.)

## TRANSFER OF STOCK. (See SHAREHOLDERS.)

## TRUSTS.

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## ISSUANCE OF STOCK TO PARENT AS TRUSTEE FOR CHILDREN.

- 1 (Mo. App.). A valid trust arises as against everyone except the donor's creditors where an owner of the bank stock surrenders his certificate, and has it reissued to himself as trustee for the benefit of his children, and such trust remained unrevoked at his death. (*Mize v. Bates County National Bank*, 1 Mo. App. Rep., 99.)

## WHEN DEPOSIT IMPRESSED WITH A TRUST.

- 1 (U. S. C. C.). If a banker remit a specific sum of money at the request of a customer to another bank to pay a specific debt the relation between the banker and his customer is that of principal and agent. (*City of St. Louis v. Johnson*, 5 Dill., 241.)
- 2 (U. S. C. C. A., 1897). Where the officers of a bank, when they received a deposit which they applied to the payment of a debt due from the depositor to the bank, knew or had reason to believe that the deposit contained moneys belonging to others, for whom the depositor was but the agent or factor, the persons who were in equity the owners of the money were entitled to recover it from the bank. (*Union Stock Yards National Bank v. Moore et al.*, 79 Fed. Rep., 705.)
- 3 (Ill.). A pledge for trust is not created by a promise of the officers of a bank to its savings depositors to keep and use the securities taken on the loans by way of investment for their benefit. (*Ward v. Johnson*, 95 Ill., 215.)
- 4 (Ill.). Upon deposit in a city bank of funds for transmission to a country bank for the use of the depositor the city bank becomes a trustee of the depositor; and where the country bank by reason of its failure before the deposit was made becomes unable to receive the deposit, the city bank is liable to the depositor, and the fact that the city bank, without the knowledge or consent of the depositor, deposited the money with another city bank the correspondent of the country bank, would not exempt the former bank from such liability. (*Drovers' National Bank v. O'Hare*, 119 Ill., 646.)
- 5 (Ill. Sup., 1901). Where a bank has notice of the fact that money deposited belongs to another than the depositor, it may refuse to pay his check, and be compelled to pay to the real owner. (*Hanna et al. v. Drovers' Nat. Bank*, 62 N. E. Rep., 556; 4 Banking Cases, 174; 194 Ill., 252.)

## TRUSTS—Continued.

## WHEN DEPOSIT IMPRESSED WITH A TRUST—continued.

- 6 (Kans., 1899). When an agent rightfully in possession of his principal's money deposits it in a bank of which he is president to his own credit and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the agent in a short time checks against the general balance of the account, inclusive of the deposit in question, reducing it far below the amount of such deposit, the bank has the right to presume that the agent knows the remittance has not been made and has revoked the order to make it, and that the checking out of the deposit by the agent is within the authorized terms of his agency; and in such case the bank will not be charged with notice of a trust in favor of the owner of the money to the extent of the deposit made by the agent. (*First Nat. Bank of Sharon, Pa., v. Valley State Bank of Hutchinson et al.*, 1 Banking Cases, 698; 60 Kans., 621.)
- 7 (Kans., 1899). Nor does the trust in favor of the owner of the money arise if subsequently, and at a time when the agent's general deposit is below the amount of his principal's money deposited by him, he discovers that the remittance has not been made, and therefore directs that the balance to his credit be applied upon his debt due to his principal, if he is also at the same time indebted to the bank, and it chooses to assert its lien upon his funds for its protection; but the bank may refuse to do as directed, and instead thereof may apply the balance of his account to the payment of a debt which the agent in his individual liability owes to it. (*Ib.*)
- 8 (Mass.). A trustee who deposits in a bank and causes to be credited to his private account money of the trust fund without giving notice that it is not his private property or making any special agreement in regard to it, thereby converts it to his own use; so that the bank, in the absence of any notice that it is not his private property, may apply it as such. (*School District v. First National Bank*, 102 Mass., 174.)
- 9 (Mich.). Where an agent or trustee has deposited money belonging to his principal or beneficiary in a bank to which he is himself indebted, and the bank, without his authority and in ignorance of the true ownership of the fund, has applied it on the debt, the owner is not debarred from recovering it from the bank if it can be identified. (*Burnett, admr., v. The First National Bank*, 38 Mich., 630.)
- 10 (Minn.). Although the relation between a bank and its depositor is that merely of debtor and creditor, yet the fund does not change its character from the fact that the money has been deposited in bank to the credit of the depositor. If the money in his hands was impressed with a trust in favor of another the deposit will remain subject to the same trust. (*Third National Bank v. Stillwater Gas Co.*, 30 N. W., 440; 36 Minn., 75.)
- 11 (Nebr. Sup., 1903). A trust fund does not lose its character as such by being deposited by the trustee in a bank to his own credit, but to hold the bank therefor, it must be pleaded and proved that the fund remains in the bank in some form. (*Chamberlain v. Chamberlain Banking House*, 5 B. C., 439; 93 N. W. Rep., 1021.)
- 12 (Nebr. Sup., 1902). In an action against a bank for money deposited by a trustee to his own account, evidence of payment by the bank on checks subsequently drawn by such trustee in good faith, relying on his apparent title to said fund, is inadmissible under general denial. Such fact, to be available as a defense, must be specially pleaded. (*Cady v. Bank*, 65 N. W. Rep., 907; 46 Nebr., 756, followed. (*Union Stock Yards Nat. Bank v. Haskell et al.*, 90 N. W. Rep., 233; 4 Banking Cases, 426.)
- 13 (Nebr. Sup., 1902). Trust funds do not lose their character as such by being deposited in a bank by a trustee to his own account. *Cady v. Bank*, supra, followed. (*Ib.*)

## TRUSTS—Continued.

## WHEN DEPOSIT IMPRESSED WITH A TRUST—continued.

- 14 (N. Y.). Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal under instructions thus to keep it, a trust is imposed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposits other moneys belonging to himself: nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor. (*Van Allen v. The American National Bank*, 52 N. Y., 1.)
- 15 (N. Y.). A trust can not be implied from a mere deposit in a bank by one person of his own money in the name of another. (*Beaver v. Beaver*, N. Y., 22 N. E., 940; 117 N. Y., 421.)
- 16 (Pa. Sup., 1900). Recovery can not be had of a bank of the amount of checks of which an administrator received in such capacity, deposited to his personal account and afterwards drew out and appropriated. (*Safe-Deposit and Trust Co. v. Diamond Nat. Bank*, 2 Banking Cases, 408.)
- 17 (S. C. Sup., 1899). If knowledge comes to a bank that an agent allowed to check upon funds of his principal on deposit with it is about to commit a breach of trust in drawing checks upon such funds, it is the duty of the bank to protect the rights of the principal; but, to acquire such knowledge, the bank is not required to exert itself beyond the channels of its business. (*Merchants and Planters' Nat. Bank v. Clifton Mfg. Co.*, 2 Banking Cases, 128.)

## OWNER OF MONEY DEPOSITED WRONGFULLY HAS LIEN.

- 1 (U. S. C. C. A., 1899). An agreement between two banks, by which one agrees to "handle" the items of exchange and commercial paper of the other within a certain territory, crediting the amount of such items to the account of the other on receipt, and under which the sending bank transmits such items as collections, indorsed payable to "any national or State bank," with directions to protest and return if unpaid, is an agreement for the making of collections only, and not of purchase and sale of the paper, and does not create the relation of debtor and creditor between the two banks as to items received and credited, but uncollected, at the time of the failure of the receiving bank; and any such items, or their proceeds, which can be identified as having come into the hands of its receiver, may be recovered by the sending bank. (*Richardson v. Continental National Bank of Memphis*, 94 Fed. Rep., 450; 2 B. C., 438.)
- 2 (Ohio). Where a depositor in a bank, known at the time by its officers to be insolvent, finding a mistake in the amount which he intended to deposit, told the teller to "put the money to one side" until he returned from his office, and the teller responded, "All right," but immediately mingled the deposit with the other funds of the bank, the deposit was impressed with a trust, and could be recovered in full, though not traceable directly into the hands of the assignee. (*In re Commercial Bank, Ct. Insolv.*, 2 Ohio N. P., 170.)

## COLLECTIONS WHEN IMPRESSED WITH TRUST.

*Lien of owner of collection.*

- 1 (U. S. C. C. A., 1905). A bank which, although known by its officers to be insolvent, received a draft for collection without disclosing its insolvency to the owner, collected the same and mingled the proceeds with its own funds, remitting to the owner its own draft, which was not received until after the bank was placed in the hands of a receiver, was guilty of fraud, and the proceeds of the draft, when collected, remained the property of the sender, and may be recovered from the receiver, where they can be traced into his hands; and such

## TRUSTS—Continued.

## COLLECTIONS WHEN IMPRESSED WITH TRUST—continued.

right is not affected by the fact that the sender gave directions that the remittance should be made in New York exchange, which was done; the exchange being protested and never paid. (*Western German Bank v. Norvel*, 134 Fed. Rep., 724.)

- 2 (U. S. C. C., 1895). Where a bank receives a note for collection and remittance, and did not remit, and fails with cash on hand less than the amount of the collection, the lien for trust funds converted is limited to the amount on hand, and does not extend to their assets, where there was no proof that they were obtained with the money converted. (*Boone County National Bank v. Latimer*, 67 Fed. Rep., 27.)

*Proceeds of collection as priority.*

- 3 (U. S. C. C. A., 1893). In the absence of an agreement to hold the proceeds of the collection as the property of the depositor, if the bank credits the proceeds to the depositor he becomes merely a general creditor. (*Anheuser-Busch v. Clayton*, 56 Fed. Rep., 759.)
- 4 (Mich.). If the bank is bound by an agreement to hold the proceeds of a collection as the property of the depositor and does not, but mingles them with its own funds, the depositor is entitled to a preference to the amount received on the collection. (*Wallace v. Stone*, 107 Mich., 190.)
- 5 (Tenn. Sup., 1896). A regular customer of a bank sent to it a check with an unrestricted indorsement, and directed it to be placed to his credit. The check was received and credited and the customer so advised. On the day of receipt the bank sent the check to its correspondent for collection, paid a check drawn by the customer from a part of the proceeds of the credit, and closed its doors as insolvent. *Held*, that the check was not deposited for collection, but as cash for immediate use. (*Williams v. Cox*, 37 S. W., 282; 97 Tenn., 555.)
- 6 (Tenn. Sup., 1896). Where a bank accepts a check on another bank as cash, giving therefor a sum of money, a certificate of deposit, and the balance in a credit to the account of a third person, such transaction creates merely the relation of debtor and creditor between the bank and its customer, and the latter can not, on the insolvency of the bank, follow up the check, or its proceeds, as his property. (*Friberg v. Cox*, 37 S. W., 283; 97 Tenn., 550.)
- 7 (Tenn. Sup., 1896). Where a check drawn on another bank is deposited in an insolvent bank without any special instructions, and it is not placed to the customer's credit, and immediately thereafter the receiving bank fails, and the check goes into the hands of the bank examiner and is afterwards collected, the proceeds are the property of the customer and not of the bank. (*Showalter v. Cox*, 37 S. W., 286; 97 Tenn., 547.)

## WHAT NECESSARY TO IMPRESS DEPOSIT WITH TRUST.

- 1 (U. S. C. C., 1883). No knowledge by any of the officers of a bank of its insolvency is sufficient to avoid transactions between the bank and its customers, on the ground of fraud, unless the evidence clearly shows that the directors, who represent the corporation, also had such knowledge. (*Balbach et al. v. Frelinghuysen, Receiver, etc.*, 15 Fed. Rep., 675.)
- 2 (U. S. C. C., 1883). Where complainant sent a draft to a bank for collection, charged with a trust to pay the proceeds thereof when collected to complainant, the bank being insolvent at the time, and its officers knew of its insolvency and that the bank would be obliged to suspend within a day or two, and the bank received the draft of an agent of the owner to remit the proceeds thereof, when converted into a draft on another bank, to the credit of complainant, but instead of so remitting the proceeds thereof it kept the same and mingled the proceeds of such draft with its own funds, *held*, that such conversion by the bank was fraudulent, but that in an action by com-

## TRUSTS—Continued.

## WHAT NECESSARY TO IMPRESS DEPOSIT WITH TRUST—continued.

- plainant for the recovery of such proceeds it is incumbent upon the complainant to trace the fund misappropriated into the hands of the receiver substantially appointed for the insolvent bank before the latter can be charged with recognizing complainant's equitable title thereto. (*Illinois Trust and Savings Bank v. First National Bank and another, Receiver, etc.*, 15 Fed. Rep., 858.)
- 3 (U. S. C. C., 1883). A cestui que trust can not follow his fund into the hands of an assignee in bankruptcy, or of an executor of such trustee, but must occupy the position of a general creditor of the estate, unless he can identify his fund. (*Ib.*)
  - 4 (U. S. C. C., 1883). The right to follow a trust fund ceases when the means of ascertainment and identification fail, as where the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description. (*Ib.*)
  - 5 (U. S. C. C., 1883). The right to fasten a special trust upon funds held by a receiver of an insolvent bank in Iowa not having been created by any statute of that State, but depending upon the general principles of law and equity applicable to the circumstances, decisions of the supreme court of that State in relation thereto, if not in accord with the decisions of the Supreme Court of the United States or the decided weight of authority, do not constitute a rule of property binding on the Federal courts. (*Beard v. Independent District of Pella City*, 88 Fed. Rep., 375, reversing 83 Fed. Rep., 5.)
  - 6 (U. S. C. C. A., 1898). In order that a trust fund may constitute a preferential claim against the funds of a national bank in the hands of a receiver, it must appear that these funds were actually augmented by the receipt of the trust fund. And if the trust fund was created merely by a check on the same bank, drawn by a general depositor in favor of the trustee, the amount of which was then shifted to the latter's credit, there is no right to a preference. (*Ib.*)
  - 7 (N. Y.). A trust was not impressed upon funds deposited on day the bank closed its doors in the absence of proof that the deposit had not gone into the general funds of the bank and lost its identity before reaching the receiver. (*In re North River Bank*, 14 N. Y., 261.)

## RIGHTS OF OWNER OF CLAIM IMPRESSED WITH A TRUST.

- 1 (U. S. C. C. A., 1895). The owner of trust funds wrongfully invested by the trustee in securities which remain in his hands may follow the same and impress a trust on the securities. (*City of Spokane v. First National Bank*, 68 Fed. Rep., 982.)
- 2 (U. S. C. C., 1899). A transaction by which a loan was to be made through a bank, which was to take the security from the borrower and draw on the lender for the money, *held* to be not one of banking, but of mere agency, which entitled the lender to recover from the receiver of the bank the proceeds of a draft which he paid after the suspension of the bank, and which came into the receiver's hands. (*Greer v. The Dalles Nat. Bank, C. C.*, 98 Fed. Rep., 681.)
- 3 (U. S. C. C. A., 1900). A bank *held* liable for public funds misappropriated by the treasurer of a city park board, which were deposited in such bank to the credit of an insolvent firm of which the treasurer was a member, and largely used in paying indebtedness from the firm to the bank, with the knowledge of its officers. (*McNulta v. West Chicago Park Com'rs, C. C. A.*, 99 Fed. Rep., 900; 2 B. C., 764; *West Chicago Park Com'rs v. McNulta, ib.*)
- 4 (U. S. C. C., 1896). The rule permitting the owner of a fund, which has been misappropriated by one who held it in trust or for a specific purpose, to follow the trust property in the hands of the trustee, or of a receiver, in case of insolvency, does not extend beyond permitting such owner to pursue the fund in kind, or in specific property into which it has been converted, or, if the fund has been mingled with the

## TRUSTS—Continued.

## RIGHTS OF OWNER OF CLAIM IMPRESSED WITH A TRUST—continued.

trustee's other property, to establish a charge on the mass of such property for the amount of such fund, and it does not give to the owner of such fund any rights, in preference to other creditors of the trustee, in property into which the trust fund has in no way entered. (*Boone County National Bank v. Latimer*, 67 Fed. Rep., 27, reaffirmed; *Metropolitan National Bank of Kansas City, Mo., v. Campbell Commission Co.*, 77 Fed. Rep., 705.)

- 5 (Mont., 1899). The amount of the draft collected by defendant's correspondent so far retained its identity as to be traceable to the hands of the receiver, and the plaintiff has a preferential claim against the funds in the hands of the receiver for the amount collected on the draft. (*Guignon v. First Nat. Bank of Helena et al.*, 1 Banking Cases, 290; 22 Mont., 140.)

## TRUST FUNDS AS A PRIORITY.

1. Where a deposit is wrongfully made by a trustee and the bank receives the money with the knowledge that the real owner knows nothing of the deposit, the assets of the bank become impressed with a trust to the amount of the trust funds.  
(U. S. Sup. Ct., 1881) *National Bank v. Insurance Co.*, 104 U. S., 54;  
(N. Y.) *Van Allen v. American National Bank*, 52 N. Y., 1; 2 Hav. Law Rev., 28.
- 2 (U. S. C. C. A., 1898). Where a deposit is rightfully made by a trustee, the trustee is a general creditor. (*Hawkins v. C. C. C. & St. L. Ry. Co.*, 89 Fed. Rep., 266.)
- 3 (U. S. C. C., 1892). Where the treasurer and tax collector of a county, without authority of law, deposit county moneys in a bank, and receive certificates of deposit marked "special" the title to the moneys does not pass, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors. (*San Diego Co. v. California National Bank*, 52 Fed. Rep., 59.)
- 4 (Kans. Sup., 1902). Where the money of a ward was placed in a bank without right, and mingled with the funds of the bank, so that its assets were augmented and bettered in a tangible way, a trust is impressed upon the assets; and where the bank subsequently becomes insolvent, and a receiver is appointed, who sells a portion of the assets, and it appears that not only the bank and the receiver had knowledge of the trust, but also the purchaser himself had such knowledge, it will be held that such purchaser is himself a trustee of the fund, and liable in equity to the ward for the same. (*Reeves v. Pierce*, 67 Pac. Rep., 1108; 4 Banking Cases, 545; 64 Kans., 502.)
- 5 (Nebr. Sup., 1901). Money collected by a bank for another on notes or drafts and retained is held in trust for the owner and does not become a part of the assets of the bank; and if the bank thereafter becomes insolvent, and a receiver is appointed, the one for whom the collection is made is a preferred creditor. (*State v. Bank of Commerce of Grand Island et al.*, 3 Banking Cases, 46; 85 N. W., 43; 61 Nebr., 181.)
- 6 (Nebr. Sup., 1901). Where trust funds are wrongfully converted, the beneficiary is entitled to the funds, or the proceeds thereof, so long as he can definitely trace them, until they reach the hands of an innocent holder. (Ib.)
- 7 (Nebr. Sup., 1901). The claim of a beneficiary for trust money may be preferred to the extent of the cash found among the assets of an insolvent trustee at the time of his failure, where it is not affirmatively shown that the cash assets are not part of the trust fund. Rule applied. (Ib.)



## TRUSTS—Continued.

## TRUST FUNDS AS A PRIORITY—continued.

- 8 (Nebr. Sup., 1901). Where trust money has been wrongfully commingled by a trustee with his own, and he makes payment from the common fund, it will be presumed that he paid out his own, and not trust, money. (Ib.)

*Contra.*

9. Where the fund has become mingled with the assets of the bank there is no preference.  
(Ill.) *Lanterman v. Travous*, 73 Ill. App., 670;  
(Wis.) *Nonotuck Silk Co. v. Flanders*, 87 Wis., 237.

## WHEN ASSETS IMPRESSED WITH TRUST IN FAVOR OF CREDITOR.

- 1 (U. S. C. C. A., 1894). A statement by the president of a bank, for the purpose of procuring from another bank a discount of paper, that such former bank is in good condition, when in fact it is hopelessly insolvent in consequence of the president's own malversation, is a fraud, and entitles the discounting bank to recover back the proceeds of the discount. (*Fisher v. United States National Bank*, 64 Fed. Rep., 710.)
- 2 (U. S. C. C. A., 1900). Paper delivered to a bank by a depositor for collection and deposit at a time when its officers knew that it was insolvent and which had not been collected when the bank closed its doors, remains the property of the depositor, although its indorsement to the bank was without qualification; and on its subsequent collection by the bank examiner its proceeds may be recovered from the bank's receiver if the funds in his hands have been increased thereby. (*Richardson v. New Orleans Coffee Co., Limited*, 2 Banking Cases, 522; 102 Fed. Rep., 785.)
- 3 (U. S. C. C. A., 1900). A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor, who may recover the proceeds from the receiver, where they are shown to have come into his possession. (*Richardson v. Olivier*, 105 Fed. Rep., 277.)
- 4 (U. S. C. C. A., 1900). The rights of a depositor in a national bank, as such, in case of the bank's insolvency, are not affected by the fact that he is also a stockholder, his duties and liabilities as stockholder being measured by the provisions of the statute; and he has the same right to reclaim a deposit fraudulently received from him when the bank was known by its officers to be in a failing condition as any other depositor, where he had no knowledge of the bank's condition, and did not participate in the frauds of its officers. (Ib.)
- 5 (U. S. C. C. A., 1900). A suit by a depositor in a bank against its receiver to recover the proceeds of a check fraudulently received by the officers of the bank after its insolvency, and which came into the hands of the receiver, commenced within three years after the insolvency, is not barred by laches, in the absence of a statute of limitations which would bar an action at law of like character, where no injury to anyone has resulted from the delay, which was due solely to a misunderstanding of his rights by complainant, caused in part, at least, by statements made to him by the receiver. (Ib.)
- 6 (U. S. C. C. A., 1900). Complainant was a depositor in a national bank, and on the day the bank closed its doors, and when it was known by its officers to be insolvent, he deposited a check. On the statement of the receiver that the proceeds of the check had gone into the general funds of the bank, he included the amount of the check in the proof of his claim in the insolvency proceedings, and received partial dividends on such claim. In fact, the check was collected by the bank examiner after the suspension, and the proceeds went into the hands of the receiver. *Held*, that the action of complainant in including the amount of the check in his claim under such circumstances did not amount to an election of a remedy, or create an equitable estoppel which precluded him, on learning the facts, from maintaining a suit against the receiver to recover the proceeds of the check

## TRUSTS—Continued.

## WHEN ASSETS IMPRESSED WITH TRUST IN FAVOR OF CREDITOR—continued.

as his property, on tendering back the dividends received thereon, before the closing of the estate in insolvency, and while the money was still in the receiver's hands. (Ib.)

- 7 (Ind. App.). On the insolvency of a bank which has collected notes sent to it for collection, and failed to remit the proceeds, a trust will be imposed on the assets of the bank in favor of the person sending them, as against the general creditors of the bank, if it is proven that the moneys collected were deposited in the bank and commingled with other funds of the bank, or if they went into property represented by the assets in the hands of the assignee of the bank. (*Winstandley v. Second National Bank*, 41 N. E., 956; 13 Ind. App., 544.)
- 8 (Pa., 1898). A bank to accommodate a trust company accepted its check in exchange for the face value of the check in \$2 bills in a package, at a time when the officers of the trust company knew that it was insolvent. The trust company made an assignment on the next day and turned over the package of bills to its assignee. The bank filed a bill in equity praying that the assignee be required to restore such package to it unopened. *Held*, that such relief should have been granted, the package of money having been impressed with a trust, the title never having passed from the bank, because the fact that the trust company's doors were kept open on that day was a misrepresentation to the public as to its financial conditions. (*Corn Exchange Nat. Bank v. Solicitor's Loan and Trust Company et al.*, 1 Banking Cases, 120; 188 Pa., 330.)
- 9 (S. C., 1901). To entitle a claimant to priority over other creditors of an insolvent bank on the ground that he is a cestui que trust, and not a creditor, as to the proceeds of drafts sent by him to the bank for collection, and collected by the bank, but not remitted, he must show that such proceeds, in some form, have gone into the assets of the bank; and if he fails to do so he must share ratably with other creditors in the distribution of the assets. (*White v. Commercial and Farmers' Bank of Rockhill et al.*, 38 S. E. Rep., 453; 3 Banking Cases, 403; 60 S. C., 122.)
- 10 (Tenn. Sup., 1896). Where a bank, knowing its insolvency, receives a check, which it credits to the depositor as cash, and then sends to a correspondent, who, after the failure of said bank, but without notice thereof, credits the check to it as cash, and subsequently pays over the proceeds to the receiver, the depositor may recover such proceeds as a preferred claim. (*Bruner v. First Nat. Bank of Johnson City*, 37 S. W. Rep., 286; 97 Tenn., 540.)

## WHEN ASSETS NOT IMPRESSED WITH TRUST IN FAVOR OF CREDITOR.

- 1 (U. S. C. C., 1888). A creditor will not have a lien upon the funds of the association because checks given in settlement of balances were fraudulent and were given at a time when the bank was hopelessly insolvent and its officers were contemplating flight. (*Citizens' National Bank v. Dowd*, 35 Fed. Rep., 340.)
- 2 (U. S. C. C., 1897). When a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full. (*Jewett et al. v. Yardley*, 81 Fed. Rep., 920.)
- 3 (U. S. C. C. A., 1899). Where it is not shown that a certain collection made by a receiver of an insolvent national bank was transmitted by a correspondent of the bank, nor included in the list of its items sent, it is not sufficiently traced; and this though the receiver testified that

## TRUSTS—Continued.

## WHEN ASSETS NOT IMPRESSED WITH TRUST IN FAVOR OF CREDITOR—continued.

- the item was collected for the transmitting bank. (*Richardson v. Louisville Banking Co.*, of Louisville, Ky., 94 Fed. Rep., 442.)
- 4 (Colo. App., 1895). Where a check payable to two persons as Government officers is indorsed by one of them for both, by indorsement showing their official character, and deposited in a bank to be credited to his individual account, and thereby becomes mingled with the funds of the bank, the fact that the check was intrusted to them as officers can not be urged by the payee to charge the proceeds as a trust fund in the hands of an assignee in insolvency of the bank, in an action to which the Government is not party, and in which the authority of the depositing payee to act for his copayee is not denied. (*Meldrum v. Henderson*, 43 P., 148; 7 Colo. App., 256.)
- 5 (Ill. Sup., 1895). A depositor who receives an ordinary certificate of deposit, and whose money is mingled with the other funds of the bank, is not entitled, on the insolvency of the bank, to any preference over other creditors, even though the banker promised him to keep his money separate from the other funds. (*Bayor v. American Trust and Savings Bank*, 41 N. E., 622; 157 Ill., 62.)
- 6 (Ind. Sup., 1899). The usual and ordinary custom by which banks are generally controlled in collecting paper does not require them to hold the money collected separate and apart from its own funds and remit the identical money collected. And when the money is collected and the proper credit given to the person by whom the paper was sent for collection, as a general rule the relation of debtor and creditor is created between the bank and such person, and the relation of trustee and cestui que trust does not arise. And the fact that the bank is insolvent when the proceeds of the paper are mingled with its own funds is immaterial in this connection, if its officers are not aware of its insolvency. (*Union Nat. Bank v. Citizens' Bank of Union City et al.*, 1 Banking Cases, 712; 153 Ind., 44.)
- 7 (Ky. App., 1899). Where deposits are received by a bank with knowledge that is is a trust fund, under an agreement to repay it with interest, and such fund is used by the bank in its business, and the bank subsequently makes a general assignment for the benefit of its creditors, the cestui que trust are not entitled to have the deposits refunded out of the assets in the hands of the bank's assignee, to the exclusion of general creditors, unless it appears that the trust fund was contained in the assets of the bank which came into the hands of the assignee; and the fact that the trust fund was carried upon the books of the bank to the credit of the depositor as trustee is immaterial in this connection. (*New Farmers' Bank's Trustee v. Cockrell*, 1 Banking Cases, 687; 51 S. W., 2.)
- 8 (Tenn., 1895). Where a plaintiff sent a note and mortgage to a bank with directions to collect the same and "forward draft" for the amount, less its collection fee, the money received by the bank in payment thereof was not impressed with a trust in plaintiff's favor so as to entitle her to recover the whole amount as a preferred claim from a receiver appointed for the bank after the collection was made, though said bank was insolvent at the time it received said note and mortgage, and though payment was made by the mortgagor with a check drawn on the bank. (*Sayles v. Cox*, 32 S. W., 626; 95 Tenn., 579.)
- 9 (Tenn. Sup., 1896). Where a bank, knowing its insolvency, receives from a customer as cash a check on a foreign bank and sends the paper to its correspondent, who credits the check to it as cash, and subsequently pays the proceeds thereof to a receiver appointed for it in the meantime, it is presumed, in an action by the depositor against the receiver to recover the proceeds, that the correspondent credited the check to the bank before its failure. (*Friberg v. Cox*, 37 S. W., 283; 97 Tenn., 550.)

## TRUSTS—Continued.

## WHEN ASSETS NOT IMPRESSED WITH TRUST IN FAVOR OF CREDITOR—continued.

- 10 (Tenn. Sup., 1896). The burden is on one who transferred a draft to a bank prior to its failure, and who seeks to follow and reclaim the proceeds as against a receiver, to show that they were not received and mingled with the other funds of the bank before the failure; and where they were placed to its credit by a correspondent on the same day the receiver was appointed, in the absence of further proof as to the exact time it will be presumed that the credit was given before the receiver was appointed. (*Klepper v. Cox*, 37 S. W., 284; 97 Tenn., 534.)
- 11 (Tenn. Sup., 1896). Money received by a bank and entered to the depositor's general credit as cash can not be reclaimed after the insolvency of the bank on the ground that the bank officials had knowledge of the insolvency when they received the deposit, there being no means of identifying and separating it from the funds on hand when the receiver took charge. (*Bruner v. First National Bank of Johnson City*, 37 S. W., 286; 97 Tenn., 540.)

## CLAIM NOT PREFERRED WHEN NOT IMPRESSED WITH A TRUST.

- 1 (U. S. Sup. Ct., 1897). Where, by a special agreement, the clearing house was permitted to retain the paper of a bank each day until it settled its balance with the clearing house for that day, the clearing house is entitled, up to notice of insolvency, to set off the due bills for balances in clearings of the preceding days against the proceeds of the collections in its hands, but can not (it not being included in said special agreement) set off the amount due from the bank for loan certificates, as that would be a preference within the prohibition of Revised Statutes, 5242. (*Yardley v. Philler*, 167 U. S., 344.)
- 2 (U. S. C. C. A., 1900). A deposit of public funds, on which, under the law, interest must be paid, can not be special or in trust, and, in case of insolvency of the depository, stands on the same footing with other demands. (*McNulta v. West Chicago Park Comrs.*, 99 Fed. Rep., 900; 2 B. C., 764; *West Chicago Park Comrs. v. McNulta*, ib.)
- 3 (U. S. C. C. A., 1895). The owner of property intrusted to another by whom it was misapplied, is not entitled to a general lien on the assets of the trustee for the value of the property, and can only follow the same as far as it can be traced either in its original form or in other forms into which it has been converted. (*Spokane County v. First National Bank*, 68 Fed. Rep., 979.)
- 4 (U. S. C. C. A., 1896). Plaintiff's bank sent a New York draft to the C. bank, to be deposited to plaintiff's credit; and the C. bank, which was insolvent, sent the draft to the N. bank, in New York, to be deposited to its credit. The N. bank applied the draft to reduce a debt due it by the C. bank, the draft being paid by the drawees, after some delay, under express directions from plaintiff. *Held*, that plaintiff was not entitled to payment of the amount of the draft by the receiver of the C. bank as a preferred claim, the amount of the assets for distribution among creditors not having been increased in that amount by the deposit of the drafts. (*City Bank of Hopkinsville v. Blackmore*, 75 Fed. Rep., 771.)
- 5 (Mo. Sup., 1899). The plaintiff bank sent items to another bank for collection, and they were collected by the latter bank by charging the accounts of certain of its depositors, with their consent, and crediting plaintiff therewith, at a time when the collecting bank had no funds on hand, except a small amount, not a dollar of which had been received from the depositors owing the collections. Plaintiff had not received payment for any portion of such collection items when the collecting bank became insolvent and assigned. *Held*, that plaintiff was not entitled to a preference over general creditors on account of such collections, it not appearing that the assets in the hands of the assignee had been augmented thereby. (*Midland Nat. Bank of Kansas City v. Brightwell*, 1 Banking Cases, 379.)

## TRUSTS—Continued.

## CLAIM NOT PREFERRED WHEN NOT IMPRESSED WITH A TRUST—continued.

- 6 (Wash.). Plaintiffs sent a draft to the defendant bank for collection. The bank collected it, and issued its own New York draft, payable to plaintiffs, for the amounts so collected, less exchange, and sent it to plaintiffs, who accepted it and forwarded it for collection. The latter draft, however, was not paid, owing to the defendant bank's suspension. *Held*, that the bank was a debtor, and not a trustee, of plaintiffs. (Bowman v. First National Bank, Wash., 38 P., 211; 9 Wash., 614.)

## WHEN DEPOSIT TO RESTORE IMPAIRED CAPITAL NOT A TRUST FUND.

- 1 (U. S. C. C., 1890). The Comptroller having notified a national bank that its capital was impaired, it was agreed that it might continue business on the directors putting in \$100,000 in cash and retiring that amount of objectionable securities. That sum was contributed, the account being opened with trustees appointed by the directors to manage the fund, with full power as far as the bank was concerned, and to account therefor to the contributors in such manner as to protect the equities of each individual and the bank in relation to the bank and its legal rights. It was understood between the trustees and the examiner that the securities to be retired were to be designated by the Comptroller or examiner, but there was no such understanding with the Comptroller. The full amount of objectionable securities had not been selected and given to the trustees when the bank was closed, the receiver taking and proceeding to collect the whole assets. *Held*, that the receiver was not required to account for the balance of the \$100,000 as a special trust fund, but merely as a debt. (Booth et al. v. Welles, 42 Fed Rep., 11.)

## WHAT AMOUNTS TO AN EQUITABLE ASSIGNMENT.

- 1 (U. S. Sup. Ct., 1897). It is settled that a check drawn in the ordinary form does not, as between the maker and the payee, constitute an equitable assignment pro tanto of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors. (Fourth Street Nat. Bank of Philadelphia v. Yardley, 165 U. S., 634.)
- 2' (U. S. Sup. Ct., 1897). That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature, if made, will be enforced in equity, is also settled doctrine of this court. (Ib.)
- 3 (U. S. Sup. Ct., 1897). The Keystone Bank, through its president, solicited the Fourth Street Bank to give to the former \$25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. At the same time that this request was made the president of the Keystone Bank made the further statement that his bank owed a balance at the clearing house which it could not meet "because its funds were in the city of New York," and exhibited a memorandum showing the amount to its credit with the Tradesmen's Bank to be in the neighborhood of \$27,000. In reliance upon such representations and the statements made, supported by the memorandum exhibited, the Fourth Street Bank delivered to the Keystone Bank the certificates requested, and there was delivered a check for \$25,000 upon the Tradesmen's National Bank of New York. The draft in question was at once forwarded to the city of New York, and was presented for payment at the Tradesmen's Bank on the following morning, when payment was refused. At the time of presentment

## TRUSTS—Continued.

## WHAT AMOUNTS TO AN EQUITABLE ASSIGNMENT—continued.

- the Tradesmen's Bank had to the credit of the Keystone Bank \$19,725.62 in cash and collection items amounting to \$7,181.70; in all, \$26,907.32. Of this amount, \$18,056.21 had been remitted by the Keystone Bank on the day previous. *Held*, (1) that, it being established that it was the intention and agreement of the parties to the transaction that the check, drawn generally, should be paid out of a particular fund, such check, as between the parties, is to be treated as though an order for payment out of the specific designated fund; (2) that as the Fourth Street Bank contracted and parted with its money on the faith of the representations of the Keystone Bank that there was to its credit in the Tradesmen's Bank a specific sum, and the fund which came into the hands of its voluntary assignee was the fund as to which the representations were made, the Keystone Bank and its assignee were in equity estopped from asserting, to the prejudice of the Fourth Street Bank, that the character and condition of the fund was otherwise than it was represented to be. (Ib.)
- 4 (U. S. C. C., 1893). In a package of miscellaneous bonds was the memorandum of the date, amount, and time when due, and also the words "\$6,500 due Putnam." *Held*, that these facts did not show any equitable assignment by the bank to the plaintiff of \$6,500 worth of bonds. To constitute an equitable assignment of property there must be an appropriation or separation, and the mere intent to appropriate is not sufficient. (*Putnam Savings Bank v. Beal*, 54 Fed. Rep., 577.)
- 5 (N. Y.). M., who kept an account with the M. and M. Bank of Troy, deposited with that bank a check given for value, drawn by defendant, payable to the order of M. and indorsed by him in blank. Said bank credited the amount of the check in M.'s bank pass book, which was returned to him, and on the same day it mailed the check to plaintiff, its correspondent in New York, and its creditor, to be credited on account, and it was so credited. M. stopped payment of the check, and when plaintiff caused payment to be demanded of the drawee it was refused. Notice of presentation and protest was given to defendant, who subsequently paid the amount to M. In an action upon the check, *held*, that upon the deposit the M. and M. bank became the owner of the check, and as such could and did give a perfect title to its transferee, and that plaintiff was entitled to recover. (*The Metropolitan National Bank of New York v. Lloyd*, 90 N. Y., 330.)
- 6 (N. Y.). It is not enough to make an equitable assignment of money on deposit in bank that a check be drawn therefor; but where the money was deposited as the money of the holder of the check, though in the drawer's name, and that fact is communicated to the bank before any other right has accrued to the fund, the same becomes in equity the property of the holder of the check, and he may recover it from the bank. (*Van Allen v. The American National Bank*, 3 Lans., 517; 52 N. Y., 1.)
- 7 (Wis., 1899). If the owner of a bank credit gives a check thereon, for value, to another, with intent to transfer such credit, or a part of it, to such order, the latter will thereby be constituted at least the equitable owner of such fund or sufficient thereof to satisfy the check, so that whether the bank be legally liable to the check holder or not, if by any means the parties interested are brought into a court of equity while the bank is yet the debtor and can be protected against paying its debt twice, and it stands indifferent as to who gets the money so long as it is protected, the check holder will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the bank. (*Dillman v. Carlin*, 2 Banking Cases, 89; 105 Wis., 14.)

## TRUSTS—Continued.

## RECOVERY OF TRUST FUNDS FROM RECEIVER.

- 1 (U. S. C. C., 1903). Plaintiff furnished securities to the cashier of a bank, the insolvency of which was concealed from her, to be pledged as security for a note of the cashier, the proceeds of which were placed to the credit of such bank with its reserve bank. A portion of such proceeds was applied to the payment of an overdraft due the reserve bank, and the remainder stood to the credit of the insolvent bank at the time a receiver was appointed therefor and came into his hands. *Held*, that plaintiff, having paid the note to release her securities, was entitled to recover from the receiver the portion of the proceeds which came into his hands, and, as to the remainder, was entitled to be subrogated to the right to dividends of the reserve bank whose indebtedness it paid. (*Hallett v. Fish*, C. C. Vt., 123 Fed. Rep., 201.)
- 2 (U. S. C. C. A., 1905). When a bank, known by its officers to be insolvent, collects money for a customer and mingles the same with its own funds, which to an amount larger than the sum so received go into the hands of its receiver, it is not essential to the right of the customer to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount so collected. (*Western German Bank v. Norvel*, 134 Fed. Rep., 724.)

*Interest on trust funds.*

- 3 (U. S. C. C., 1903). One recovering money which came into the hands of the receiver of an insolvent national bank as a trust fund, of which she was owner, is not entitled to interest thereon. (*Hallett v. Fish*, C. C. Vt., 123 Fed. Rep., 201.)

ULTRA VIRES. (*See POWERS.*)USURY. (*See INTEREST AND USURY.*)VICE-PRESIDENT. (*See OFFICERS.*)VOTING. (*See SHAREHOLDERS.*)





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## ABBREVIATIONS.

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A .....	} Atlantic Reporter.
Atl. Rep. ....	
Abb. N. C. ....	Abbott's New Cases (New York).
Abb. U. S. ....	Abbott's U. S. Circuit Court Reports.
A. K. Marsh. ....	A. K. Marshall's Kentucky Reports.
Ala. ....	Alabama Reports.
Alb. L. J. ....	Albany Law Journal.
Am. L. T. (N. S.) .....	American Law Times (New Series).
Am. L. Reg. ....	American Law Register (Philadelphia).
Am. Rep. ....	American Reports (selected cases).
Ariz. ....	Arizona Reports.
Ark. ....	Arkansas Reports.
B. & Ad. ....	Barnwell and Adolphus' English King's Bench Reports.
B. C. ....	} A collection of all cases affecting banks decided by
Banking Cases .....	} courts of last resort in the United States.
Barb. ....	Barbour's Supreme Court (New York) Reports.
Baxt. ....	Baxter's Tennessee Reports.
Beav. ....	Beavan's English Rolls Court Reports.
Ben. ....	Benedict's U. S. District Court Reports.
Biss. ....	Bissell's U. S. Circuit Court Reports.
Black. ....	Black's U. S. Supreme Court Reports.
Blackf. ....	Blackford's Indiana Reports.
Blatchf. ....	} Blatchford's U. S. Circuit Court Reports.
Blatch. ....	
Bradw. ....	Bradwell's Appellate (Illinois) Reports.
Bush. ....	Bush's Kentucky Reports.
Cal. ....	California Reports.
Cent. L. J. ....	Central Law Journal, St. Louis, Mo.
Ch. D. ....	Chancery Division English Law Reports.
Clark. ....	} Clark's Reports (58) Alabama.
	} Clark's Pennsylvania Law Journal Reports.
Col. ....	Colorado Reports.
Col. App. ....	Colorado Court of Appeals.
Conn. ....	Connecticut Reports.
Cow. ....	Cowen's New York Reports.
Cranch. ....	Cranch's U. S. Supreme Court Reports.
Cush. ....	Cushing's Massachusetts Reports.
Dallas. ....	Dallas U. S. Supreme Court Reports.
De G. F. & J. ....	De Gex Fisher & Jones' English Chancery Reports.
Del. ....	Delaware Reports.
Dill. ....	
Dillon. ....	} Dillon's U. S. Circuit Court Reports.
Drew. ....	Drewry's English Vice-Chancellor's Reports.

E. C. L. ....	English Common Law Reports.
Fed. Rep. ....	Federal Reporter.
Fla. ....	Florida Reports.
Flippin. ....	Flippin's U. S. Circuit Court Reports.
Ga. ....	Georgia Reports.
Grattan. ....	Grattan's Virginia Reports.
Gray. ....	Gray's Massachusetts Reports.
Harr. ....	Harrington's Delaware Reports.
Hask. ....	Haskell's United States District Court Reports.
Heisk. ....	Heiskell's Tennessee Reports.
Holm. ....	Holmes' U. S. Circuit Court Reports.
Howard. ....	Howard's U. S. Supreme Court Reports.
How. Pr. ....	Howard's New York Practice Reports.
Hughes. ....	Hughes' U. S. Circuit Court Reports.
Hun. ....	Hun's New York Supreme Court (Appellate Division) Reports.
Idaho. ....	Idaho Reports.
Ills. ....	Illinois Reports.
Ill. App. ....	Illinois Court of Appeals.
Ind. ....	Indiana Reports.
Ind. App. ....	Indiana Appeals.
Ind. T. ....	Indian Territory Reports.
Ia. ....	Iowa Reports.
Ir. Eq. ....	Irish Equity.
Johns. ....	Johnson's New York Reports.
J. & H. ....	Johnson & Hemming's English Vice-Chancellors' Reports.
Jur. N. S. ....	The Jurist (New Series), London.
Kans. ....	Kansas State Reports.
Kans. App. ....	Kansas Court of Appeals.
Ky. ....	Kentucky State Reports.
La. Ann. ....	Louisiana Annual Reports.
L. J. ....	Law Journal, London.
L. J. Ch. ....	Law Journal, Chancery (English).
L. J. Q. B. ....	Law Journal (New Series), Queen's Bench.
L. R. Eq. ....	English Law Reports, Equity.
Lea. ....	Lea's Pennsylvania Reports.
Lea. ....	Lea's Tennessee Reports.
Mackey. ....	Mackey's District of Columbia Reports.
Md. ....	Maryland State Reports.
Mass. ....	Massachusetts State Reports.
Me. ....	Maine State Reports.
Mich. ....	Michigan State Reports.
Minn. ....	Minnesota State Reports.
Miss. ....	Mississippi State Reports.
Metcalf. ....	Metcalf's Massachusetts Reports.
Metcalfe. ....	Metcalf's Kentucky Reports.
Mo. ....	Missouri Reports (Supreme Court).
Mo. App. ....	Missouri Court of Appeals.
Moll. ....	Molloy's Irish Chancery Reports.
Mon. ....	} Montana Reports.
Mont. ....	
Montg. Co. Law. ....	Montgomery County Law Reports.

N. B. C. ....	National Bank Cases.
N. E. ....	} North Eastern Reporter.
N. E. R. ....	
Neb. ....	Nebraska Reports.
Nev. ....	Nevada Reports.
N. H. ....	New Hampshire Reports.
N. J. ....	New Jersey Reports.
N. J. Eq. ....	New Jersey Equity Reports.
N. J. L. ....	New Jersey Law Reports.
N. M. ....	New Mexico Reports.
N. Y. ....	New York State (Court of Appeals) Reports.
N. Y. S. ....	New York Supplement, containing decisions of all courts below Court of Appeals.
N. C. ....	North Carolina Reports.
N. D. ....	North Dakota Reports.
N. W. ....	} North Western Reporter.
N. W. R. ....	
Ohio Cir. Ct. R. ....	Ohio Circuit Court Reports.
Ohio ....	Ohio Reports (Supreme Court, prior to 1852).
Ohio State ....	Ohio State Reports (Supreme Court, since 1852).
Ohio N. P. ....	Ohio Nisi Prius Reports (Common Pleas and Super- ior Courts).
Okl. ....	Oklahoma Reports.
Ore. ....	Oregon State Reports.
Otto. ....	Otto's U. S. Supreme Court Reports.
Paige. ....	Paige's New York Chancery Reports.
Pa. ....	} Pennsylvania State Reports.
Pa. St. ....	
Penna. ....	
P. ....	} Pacific Reporter.
Pac. ....	
Pac. R. ....	
Pearson's Decisions ....	Decisions by Hon. John J. Pearson, judge of twelfth judicial district of Pennsylvania.
Pennewills ....	Pennewills' Delaware Reports.
Pet. ....	Peters' U. S. Supreme Court Reports.
Phila. ....	Philadelphia.
Rich Law ....	Rich's South Carolina Law Reports.
R. I. ....	Rhode Island State Reports.
Rob. La. ....	Robinson's Louisiana Reports.
So. ....	} Southern Reporter.
S. R. ....	
S. C. ....	South Carolina Reports.
S. Ct. ....	Supreme Court (U. S.) Reporter.
S. D. ....	South Dakota Reports.
S. E. ....	} South Eastern Reporter.
S. E. R. ....	
S. W. ....	} South Western Reporter.
S. W. R. ....	
Story. ....	Story's U. S. Circuit Court Reports.
Sup. ....	Supreme Court.
Super. ....	Superior Court.

Tenn.....	Tennessee Reports.
Tex.....	Texas Reports.
Tex. Civ. Appls.....	Texas Civil Appeals.
T. R.....	Term Reports (Durnford & East), English.
Thomp. & Cook.....	Thompson & Cook New York Supreme Court Reports.
U. S. (at end of Citation).....	United States Supreme Court Reports.
U. S. C. C.....	United States Circuit Court.
U. S. C. C. A.....	United States Circuit Court of Appeals.
U. S. Sup. Ct.....	United States Supreme Court.
U. S. Comp. St.....	United States Compiled Statutes.
U. S. Ct. Cls.....	United States Court of Claims.
Utah.....	Utah Reports.
Va.....	Virginia Reports.
Vt.....	Vermont Reports.
Vroom.....	Vroom's New Jersey Reports.
Wall.....	Wallace, U. S. Supreme Court Reports.
Walker.....	Walker's Reports (Michigan).
	Walker's Reports (Mississippi).
	Walker's Reports (Pennsylvania).
	Walker's Reports (Texas).
Wash.....	Washington Reports.
Wend.....	Wendell's New York Reports.
W. L. Bul.....	Western Law Bulletin.
Wis.....	Wisconsin Reports.
Wheat.....	Wheaton's U. S. Supreme Court Reports.
Woods.....	Woods' U. S. Circuit Court Reports.
W. N. C.....	Weekly Notes of Cases (published in Philadelphia).
W. Va.....	West Virginia Reports.
W. & W. Civ. Cases.....	White and Wilson's Civil Cases (Texas Court of Appeals).
Wyo.....	Wyoming Reports.











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